(17,974.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 195.

B. A. STOCKARD AND R. C. JONES, COMPOSING THE FIRM OF STOCKARD & JONES; J. H. McREYNOLDS, W. G. OEHMIG, T. M. CAROTHERS, AND J. H. ALLISON, PLAINTIFFS IN ERROR,

vs.

CLINT MORGAN AND J. N. McCUTCHEON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 12, 1901.

a No. 25, 4th Circuit.

Transcript.

Parties:

STOCKARD & JONES ET AL.
vs.
CLINT MORGAN ET AL. } No. 8763. Consolidated Cause.

Solicitors:

Pritchard & Sizer & R. P. Woodard; R. B. Cooke & G. W. Pickle.

Filed 6th day of August, 1900.

J. G. STUART,
Deputy Clerk.

Appeal by State.

STOCKARD & JONES ET AL.
vs.
MORGAN ET AL.

1 At a regular term of the chancery court of Hamilton county, Tennessee, begun and held at the court-house, in the city of Chattanooga, said county and State, on the first Monday, it being the 2nd day, of April, 1900—present and presiding, the Hon. T. M. McConnell, chancellor in and for the third chancery division of said State—the following proceedings were had, viz:

Thereupon court adjourned until tomorrow morning, at 9 o'clock, without transacting any business.

T. M. McCONNELL, *Chancellor.*

TUESDAY MORNING, *3rd April*, 1900.

Court met pursuant to adjournment—present and presiding, the Hon. T. M. McConnell, chancellor—when the following proceedings were had, viz:

Style of Suit.

STOCKARD & JONES
vs.
CLINT MORGAN ET AL. } No. 8763.

* * * * * * * *

Original Injunction Bill. Filed 23rd Day of March, 1900, at 9.30 A. M.

To the Hon. T. M. McConnell, chancellor, etc., presiding in chancery at Chattanooga, Hamilton county, Tennessee:

STOCKARD & JONES, a Firm Composed of B. A. Stockard and R. C. Jones, Both Residents of Hamilton County, Tennessee,
against
2 CLINT MORGAN and J. N. MCCUTCHEON, Residents of Hamilton County, Tennessee.

Complainants respectfully show unto your honor that during the present year, 1900, they have been soliciting and taking orders from wholesale or jobbing merchants in Chattanooga, Tennessee, for goods to be sold them by non-resident parties. They represent certain particular non-resident firms and corporations, do not solicit trade from or sell to consumers, and their principal- in all cases are non-residents. At the end of the month or at stated times their non-resident principals send to them their commissions due them for their services in acting as their agents, drummers, or salesmen. In no instance are complainants the owners of the goods sold, and all they have to do is to negotiate sales made by their non-resident principals to the local dealers. If the orders they send to their non-resident principals are rejected, they get no commission thereon. Complainants are only agents, drummers, or salesmen for certain non-resident principals who own and sell the goods. They do not solicit, sell, drum, or act for or receive pay from any resident of Tennessee whatever, nor do they ever hold themselves out, assume, or pretend to act as the agents, drummers, or salesmen of any resident of Tennessee. They are engaged exclusively in interstate-commerce business. Their business is limited to selling and taking orders for non-residents. They are simply "drummers on foot" for non-residents.

Complainants were engaged in the same business during 1897, 1898, and 1899, and in no instance during 1897, 1898, 1899, or 1900 have they acted or assumed or pretended to act otherwise than as drummers, agents, or salesmen exclusively for non-resident principals.

Complainants, being thus engaged only in interstate commerce, have never applied for or obtained any license to carry on business in Hamilton county, Tennessee, being advised that they were not bound to obtain a license for the character of business they conducted. They charge that they do not owe any privilege tax or other tax or license to the State of Tennessee or Hamilton
3 county. They charge that said State has never had any law in existence during either of said years 1897, 1898, 1899, or 1900 (nor has it now any law in existence) imposing a privilege tax or other tax upon complainant- for the business they have been engaged in. They charge that Hamilton county has no such law, nor

has it had during any of said years; but even if the said State or county has or had a law imposing a tax upon them for the business they have been conducting, they charge the same was or would be invalid, unconstitutional, null and void, and in violation of his rights in the carrying on of interstate commerce. It would be contrary to the Constitution of the United States in the subject of interstate commerce.

Complainant- now charge that defendant Clint Morgan, claiming to be a constable of Hamilton county, Tennessee, has in his hands some sort of paper, called a "distress warrant," issued to him by defendant J. N. McCutcheon, and under this paper is threatening to seize complainants' property and sell the same to pay $320.00 and $48.00 penalty—in all, $368.00—besides "fees and cost of the warrant."

Complainant- applied to said Morgan to inspect the paper or writ under which he was acting and have procured a true and correct copy of the same, which is filed herewith as part of this bill, marked Exhibit "A," but need not be copied.

Complainants, through their attorney, applied to said McCutcheon to know what the "distress warrant" was for, and if he claimed that complainants owed him as clerk, or the State, or the State and county, a license or privilege tax of $320.00 and $48.00 penalty for the current year, or for 1900, or for the year preceding the date of the so-called "distress warrant." Said McCutcheon informed said attorney that he did not claim as much as $320.00 to be due him as clerk or to the State and county for one year alone, or for 1900, or for the past year, but that the amounts for several years were "doubled up" in some way, and he did not know precisely how the $320.00 and $48.00 were arrived at, but that the "distress warrant" was issued under the instructions of E. H. Williams.

Complainants charge that said so-called "distress warrant" is illegal, invalid, and void. It commands that complainants'
4 goods and chattels be distrained a-d sold to pay the $320.00 and $48.00 penalty, as endorsed thereon, being the tax imposed by law in such cases, but no amounts whatever are endorsed. The endorsement on said paper is as follows: "State tax, $—; county tax, $—; tax, $—; tax, $—; tax, $—; tax, $—; fee, $—; fee, $—; warrant, $—; total, $—."

The paper neither on its face nor by endorsement shows any revenue is even claimed for the State of Tennessee or Hamilton county. No year or period of time is shown for which any privilege tax or revenue is claimed. The writ or so-called distress warrant is vague and indefinite. The time is indefinite, and the amounts demanded in the writ are arbitrary. So far as appears, the amounts could have been made $1,000.00 or $10,000.00 and then endorsed as blanks. Complainants are left in darkness, except that defendants are attempting to seize and sell their property for $320 and $48 penalty and fees and cost under a writ, which does not comply with the law of the land for writs.

Complainants again aver and charge that they do not owe the $320.00 and $48.00 or any other sum or sums to said J. N. McCutcheon, clerk, or to said State or county; that no privilege tax

has ever been imposed upon them, nor could the same have been imposed upon or levied against them legally during either 1897, 1898, 1899, or 1900, and to allow their property to be seized and sold and complainants to be harassed and injured by this illegal and void so-called "distress warrant" would be inequitable, illegal, and unjust, and the enforcement of the writ should be enjoined.

Complainants here point out, as they are advised, that the legislature of Tennessee, by Acts of 1899, in chapter 432, page 1019, imposes a privilege tax of $20.00 per year in cities of the size of Chattanooga upon "merchandise brokers," which shall include, when the sale is made in the State, all sellers of merchandize to consumers upon orders or samples, and also all agents engaged in such business." All — section 17 of this act purports to authorize county court clerks to issue "distress warrants" "as soon as privilege tax" is delinquent, but neither said act nor any other law of said State even purports to levy or impose a tax upon parties conducting the kind of business complainants have been doing; nor has the county imposed such tax, nor could it legally impose the same, nor could said county legally impose a privilege tax exceeding the State's or where the State has not made the privilege. There is no law for a penalty of 15 per cent. on privilege taxes, for which a county court clerk may have authority to issue a distress warrant.

Complainants further charge that the State revenue agents alone have a right to collect delinquent privilege taxes, and they must do this by suit in the circuit or chancery court, as provided in sec. 79 of ch. 435 of Tennessee Acts of 1899, and even before those acts, as provided in Shannon's Code, sec. 942. Prior to said acts of 1899 the chancery court clerk was authorized (if the law was valid, which is not admitted) to issue a distress warrant against one subject to privilege tax, as provided in Shannon's Code, secs. 1007 to 1010.

But neither under said acts of 1899 nor under any prior law is any authority conferred upon the county court clerk to issue distress warrants for privilege taxes for back years or for "back privilege taxes." As stated, delinquent privilege taxes must be sued for by the State revenue agents, either in the circuit or chancery court.

Complainants charge that, even if the $320.00 named in said distress warrant could be presumed to be claimed as revenue due the State and county or either of them, and even if said McCutcheon should claim that complainants owned privilege taxes, as "merchandise brokers," for 1899 and 1900, to both State and county, the amount for each year could be only $40, or $80 for both years; and then, even if the amounts were "doubled up," they would be only $80 and $160 respectively, and not $320; so that it is manifest, even if said McCutcheon and Morgan are trying to collect from complainant- privilege taxes claimed for the State and county, they have clearly included in said "distress warrant" privilege taxes claimed for years back of 1899.

Complainants charge that the $48 penalty named in said distress warrant is manifestly a fifteen per cent. attorney's fee, sought to be

collected for said E. H. Williams, as State revenue agent
6 and said revenue agent is not entitled to the same, and it is wrongfully put in said warrant. By law the revenue agents are only allowed 15 per cent. fee where they sue for and recover revenue from defendants.

Complainants charge that said distress warrant should not be executed and is illegal and void for many reasons. It is indefinite and uncertain, and does not show any privilege taxes due or even claimed for the State or county. The endorsements thereon are blanks. Even if it could be supposed to be a writ by the county court clerk to collect privilege taxes for the State and county, yet it includes taxes claimed for "back years," with which the clerk had nothing to do at the date of the warrant. It illegally calls for $48 penalty. It is not founded on any judgment. It does not show any authority of law for its issuance. It does not specify any sum due the State or the county or any other party.

Complainants insist that in order to be valid at all it must show, at least, what money is claimed as due and to whom; that they should not be deprived of their property without due process of law, and that the execution of said so-called "distress warrant" would be in violation of due process of law.

The premises considered, complainants pray that the parties named as such in the caption be made defendants to this bill by services of subpœna and copy and required to answer this bill fully; that they may be enjoined from seizing the property of complainants and from enforcing said so-called "distress warrant." Let the same be declared invalid, illegal, and void. Let the injunction be made perpetual; and complainants pray for such other and general relief as the nature of the case requires. This is the first application for injunction in this cause.

R. P. WOODARD,
PRITCHARD & SIZER,
Sol'rs for Compl'ts.

STOCKARD & JONES.

STATE OF TENNESSEE, }
Hamilton County. }

Complainant B. A. Stockard makes oath that the facts
7 stated in the foregoing bill as of his own knowledge are true, and those stated upon information and belief he believes to be true.

B. A. STOCKARD.

Sworn to and subscribed before me this 22nd day of March, 1900.
[SEAL.] HERBERT BUSHNELL, *N. P.*

To the clerk & master of Hamilton county, Tennessee:

On bond therefor being given, with security in penalty and conditioned as the law requires, issue injunction as prayed in foregoing bill.

This M'rch 22, 1900, at 4.56 p. m.

T. M. McCONNELL, *Chancellor.*

EXHIBIT "A" TO ORIGINAL BILL.

State of Tennessee to the sheriff or any constable of Hamilton county, Greeting:

Whereas Stockard & Jones *has* been and *is* now exercising the privilege of merchandize broker- in said county without first obtaining a license therefor: Now, therefore, you are hereby commanded to distrain and sell so much of the goods and chattels of said Stockard & Jones, a firm composed of B. A. Stockard and R. C. Jones, as shall be sufficient to pay three hundred and twenty dollars and forty-eight dollars' penalty, as endorsed hereon, being the tax imposed by law in such cases made and provided, together with the fees and cost of the warrant, and to immediately execute and return the same to me by the 8th day of April, under the penalty prescribed by law. Herein fail not.

Witness my hand, at office, this 8th day of March, 1900.

J. N. McCUTCHEON, *Clerk.*

Instructions of E. H. Williams, State rev. ag't.

Endorsed as follows:

8 No. —. Distress warrant. Clerk County Court *v.* Stockard & Jones. Issued the 8th day of March, 1900. Came to hand — day of ——, 1—. —— ——, clerk. —— ——, D. C. Officer's return. Taxes and bill of costs. State tax, $—; county tax, $—; tax, $—; tax, $—; tax, $—; tax, $—; fee, $—; fee, $—; warrant, $—; total, $—.

Injunction Bond. Filed 23rd Day of March, 1900, *at* 9.30 *A. M.*

Know all men by these presents that we, Stockard & Jones, viz., B. A. Stockard and R. C. Jones, as principals, and J. H. McReynolds, as surety, are held and firmly bound unto Clint Morgan and J. N. McCutcheon in the penal sum of five hundred dollars; for which payment, well and truly to be made, we bound ourselves and each of us, our and each of our heirs, executors, or administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23rd day of March, in the year of our Lord one thousand nine hundred, 1900.

The condition of the above obligation is such that whereas said principal obligor hath the day of the date hereof prayed for and obtained from the court of chancery holden at Chattanooga, in the State of Tennessee, a writ of injunction, returnable to the chancery court holden at Chattanooga on the first Monday in April next:

Now, if the said principal obligor shall prosecute the said injunction with effect, or in case he fails therein shall well and truly pay and satisfy the said obligee- or either of them all such costs and damages as may be awarded and recovered against the said obligors

in any suit or suits which may be hereafter brought for wrongfully suing out of said injunction, and shall, moreover, abide by and perform such orders and decrees as the court may make in this
9 case and pay such costs and damages as the court may order, *then the above obligation to be void*; otherwise to remain in full force and effect.

STOCKARD & JONES, [SEAL.]
By B. A. STOCKARD. [SEAL.]
J. W. McREYNOLDS. [SEAL.]

* * * * * * *

Motion to Dismiss Bill. Filed 5th Day of April, 1900.

Now comes the defendants and move to dismiss the bill filed against them in this cause for want of equity on the face of the bill.

R. B. COOKE,
Sol. for Defendants.

10 *Agreement of Parties. Filed 19th Day of April*, 1900.

In the Chancery Court of Chattanooga, Tennessee.

STOCKARD & JONES
vs.
CLINT MORGAN ET AL. } No. 8763.

J. H. McREYNOLDS
vs.
CLINT MORGAN ET AL. } No. 8762.

W. G. OEHMIG
vs.
CLINT MORGAN ET AL. } No. 8764.

T. M. CAROTHERS
vs.
CLINT MORGAN ET AL. } No. 8765.

J. H. ALLISON
vs.
CLINT MORGAN ET AL. } No. 8770.

In order to save costs, it is agreed that all the above-stated causes be, and the same are hereby, consolidated under the style of Stockard & Jones *v.* Clint Morgan *et al.*, No. 8763, in this court, under which title they shall hereafter proceed.

The counsel for the defendant and the State of Tennessee and County of Hamilton need file but one answer in the consolidated case, and if it is claimed that privilege taxes are due from the complainants or any of them they may set up in said answer what priv-

ilege taxes are claimed to be due from each of the several complainants and for what years.

The complainants are allowed to rely upon any statute of limitations or other defense to any tax that may be set up or claimed against them or any of them.

The parties may take such proof as may be pertinent or
11 relevant to the controversy, to the privilege tax claimed, the character of business conducted by the several complainants, etc., but all proof will be taken and entitled in this consolidated case, No. 8763.

It is agreed that the question at issue is whether or not the complainants or any of them are liable for any privilege tax, and it is agreed that the consolidated case may be heard upon its merits, a-d that it shall be determined therein whether or not the complainants or any of them are so liable.

All questions which might affect the jurisdiction of the court to determine the liability or non-liability of any of the complainants for privilege taxes under the law and facts applicable to the cases of the several complainants are hereby waived, and, in order to put the case upon its merits, it is agreed that the court shall not consider the question of the regularity or irregularity of the distress warrants set out in the bill, but shall determine and decree upon the main question already indicated.

It is further agreed that E. H. Williams, Esq., revenue agent, may intervene in this case on behalf of the State and county as against all of the complainants and may file his answer as a cross-bill or file a cross-bill, or that his answer may be treated as a cross-bill, at his election, but in either case the complainants need not file an answer to such pleading. Such pleading as he may file shall be treated as a suit for the recovery of such privilege taxes, penalties, charges, etc., as he may claim therein, and this consolidated case shall proceed as if said revenue agent were seeking affirmative relief on behalf of the State and county by suit; and it is agreed that no advantage is to be taken of the fact that the original proceedings were begun by distress warrant instead of by suit, and said revenue agent's right to commission or fees shall be the same as if he had brought suit for the taxes claimed.

If the court shall be of the opinion that the complainants or any of them are liable for any privilege tax, the decree shall settle and determine the amount for which the several complainants
12 are liable and for what years, and whether or not they are liable for any penalties and costs or other charges and for what years, and decree shall be rendered against the several complainants for the sums found against them respectively. If the court shall be of opinion that the complainants or any of them are not liable for any privilege tax, it shall be so decreed. The object of this agreement is, as stated above, to put the cases upon their merits, and to have the question of the liability or non-liability of

the several complainants determined upon the law and all the relevant facts.

This April 17, 1900.

PRITCHARD & SIZER &
ROB'T P. WOODARD,
Sol's for Compl'ts.
R. B. COOKE, *Att'y for Def'ts.*

Answer of Defendants. Filed 19th Day of April, 1900.

The joint and separate answer of J. N. McCutcheon, county court clerk of Hamilton county, and Clint Morgan to the bills filed against them in the above-stated consolidated causes.

Defendant McCutcheon, for answer to so much and such parts of said bill as he is advised it is necessary and material for him to answer, says that it is true that he issued the distress warrants, copies of which are set out as exhibits to the bill in this cause; that it is true that he is county court clerk of Hamilton county, Tennessee, and issued said distress warrants on motion of E. H. Williams, State revenue agent, against all of said parties, who are doing business as merchandise brokers in Hamilton county, Tennessee, without having first complied with the law requiring them to pay a privilege tax of $20.00 to the State and $20.00 to Hamilton county for each year for which they have so conducted their business.

He further shows to your honor that he has made repeated demands on all of said parties to pay said privilege taxes, and they have failed and refused to do so, claiming that they, under some clause of the interstate-commerce law, were not liable for the
13 same, and it therefore became defendant's duty, under the instructions of the State revenue agent, to issue the distress warrant against said parties, as they have set out.

He further shows unto your honor that said parties are merchandise brokers, and that the revenue acts of Tennessee impose a privilege tax upon merchandise brokers, and that it is his duty as county court clerk of Hamilton county to enforce the provisions of the laws of Tennessee as well as he can in his position as clerk of the county court of Hamilton county.

Defendant Morgan shows unto your honor that said distress warrants, as set out in said consolidated causes, came to his hands as a constable of Hamilton county, Tennessee, and that he was proceeding to do his duty simply under his official oath and bond; that he has no interest in this litigation at all, and he prays to be hence dismissed with his reasonable costs.

Defendant McCutcheon denies that the State of Tennessee and Hamilton county has no law in existence imposing a privilege tax upon complainants for the business they have engaged in.

Now, having fully answered, defendants pray to be hence dismissed with their reasonable costs.

J. N. McCUTCHEON,
CLINT MORGAN,
By Counsel.

R. B. COOKE,
Sol'r for Def'ts.

Petition of the State of Tennessee and Hamilton County. Filed 19th Day of April, 1900.

Petitioners respectfully show unto your honor that the complainants Stockard and Jones, a firm composed of B. H. Stockard and R. C. Jones, both residents of Hamilton county, Tennessee; W. G. Oehmig, J. H. McReynolds, T. M. Carothers, and J. H. Allison, all citizens of Hamilton county, Tennessee, are merchandise brokers, doing business in Hamilton county, Tennessee; that they are liable to petitioners for privilege taxes as follows: The firm of Stockard & Jones for privilege taxes due the State of Tennessee and Hamilton county for the years 1897—State tax, $20.00; county tax, $20.00.

For the year 1898—State tax, $20.00; county tax, $20.00.

14 For the year 1899—State tax, $20.00; county tax, $20.00.

For the year 1900—State tax, $20.00; county tax, $20.00, together with costs, fees, and penalties, as provided in the Act of 1899, chapter 435.

W. G. Oehmig is indebted to petitioners in the same amount for the same years.

J. H. McReynolds is indebted to petitioners for the State tax for the year 1900 in the sum of $20.00—county tax, $20.00—together with costs, fees, and penalties thereon allowed by law.

T. M. Carothers is indebted to petitioners for the said privilege taxes for the years 1897, 1898, 1899, and 1900 in the same amount and made up of the same items as Stockard & Jones, as set out above.

J. H. Allison is indebted to petitioners in the same amount and for the same items as said Stockard & Jones.

Petitioners show unto your honor that all of said parties have failed and refuse to pay said privilege taxes, as set out above, and distress warrants have been issued against them, on motion of E. H. Williams, State revenue agent, and said parties have come into your honor's court and enjoined the collection of said distress warrants.

Petitioners pray that this petition be filed in said consolidated cases against all of said parties above named, that process issue against them, and that they be required to answer, but their answer under oath is waived; that the petitioners have a decree against said parties and their securities on their injunction bond for the amount of said privilege taxes as set out above, together with inter-

est, costs, fees, and penalties as allowed by law, and for general relief.

THE STATE OF TENNESSEE,
HAMILTON COUNTY,
By E. H. WILLIAMS,
State Revenue Agent.

R. B. COOKE, *Sol'r.*

15 *Answer of Stockard & Jones et al. to Petition of State of Tennessee. Filed 26th Day of April,* 1900.

The joint and separate answers of Stockard and Jones, a firm composed of B. H. Stockard and R. C. Jones; W. G. Oehmig, J. H. McReynolds, T. M. Carothers, and J. H. Allison to the petition of the State of Tennessee and Hamilton County, filed against them in the above-entitled case.

For answer to so much and such parts of said petition as these respondents are advised it is material and necessary for them to respond to, they say:

They jointly and severally deny that they are liable to the State of Tennessee or the county of Hamilton for privilege taxes for the years and in the sums mentioned in said petition or for any other years or in any other sums whatever.

It is true that these respondents have failed and refused to pay said alleged privilege taxes, for the reasons fully set out in their several bills filed in this consolidated case, and they jointly and severally aver that the statements contained in their said bills are true as therein made, and constitute full and complete defenses to the illegal demand set up against them by the petitioners.

Respondents refer to and adopt the statements contained in their said several original bills as fully as if they were here again made and repeated.

And now, having fully answered, respondents pray to be hence dismissed with reasonable costs.

STOCKARD & JONES,
W. G. OEHMIG,
J. H. McREYNOLDS,
T. M. CAROTHERS,
J. H. ALLISON,
By PRITCHARD, *Sol.*

R. P. WOODARD,
PRITCHARD & SIZER, *Sol'rs.*

Agreement of Parties. Filed 1*st Day of May,* 1900.

In this consolidated cause the following agreement is made
16 as to the facts relating to the matters in controversy, viz:

It is agreed that the several complainants in the original bills, to wit, J. H. McReynolds, Stockard & Jones, W. G. Oehmig, T. M. Carothers, and J. H. Allison, are residents of Hamilton county, Tennessee.

That said J. H. McReynolds has been carrying on business in Chattanooga, said county and State, during the present year, 1900; that said Stockard and Jones, W. G. Oehmig, T. M. Carothers, and J. H. Allison have been carrying on business in said city during the years 1897, 1898, 1899, and 1900.

That the character of said business so carried on by the respective complainants, or the manner of conducting the business of each, is and has been as follows:

The complainant, as the representative of non-resident parties, firms, or corporations, solicits orders for goods from jobbers or wholesale dealers in Chattanooga, Tennessee, and when such orders are obtained sends them to his non-resident principal or principals. If an order is accepted the goods are shipped by such non-resident principal or principals to the local jobber or wholesale dealer. Up to the time of the sale, the goods in all instances belong to the non-resident principal or principals, and are shipped to the State of Tennessee from another State.

In making sales or soliciting orders for the goods, the complainant sometimes exhibits samples to the local jobber or wholesale dealer and sometimes takes the orders without showing a sample.

Unless complainant has been previously authorized by the principal or principals to sell at a fixed price, the orders are taken subject to acceptance or rejection by such non-resident principal or principals, who own the goods.

At the end of each month, or at stated periods, the complainant is paid a commission by such non-resident principal or principals for goods previously sold on accepted orders. No commission is paid on orders taken but rejected. Complainant does not receive for his services any pay or salary from any local jobber or dealer or resident of Tennessee, nor does he assume to represent, or represent or
17 hold himself out as representing, any resident of Tennessee or negotiate any sales of goods for residents of Tennessee. His principals are all residents of other States of the United States, and the goods sold are shipped from such other States to the State of Tennessee for delivery to buyers who reside in Tennessee.

The complainant has an office or "headquarters" in Chattanooga, Tenn., where he keeps samples, stationery, and other articles; but he travels around on foot daily or frequently in drumming or soliciting orders for goods, as before stated. His principals are specific parties, firms, or corporations, all non-residents of Tennessee and residents of other States in the United States, and he does not represent or hold himself out as representing the public in general, or negotiate or sell for any resident of Tennessee.

The defendants and solicitors for the State of Tennessee and Hamilton county contend that, under the facts, the complainants are "merchandise brokers," and each of them is bound for privilege taxes under the laws of Tennessee.

That J. H. McReynolds should pay a privilege tax for 1900 to the State of $20.00, and to the county of $20.00.

That Stockard & Jones should pay to the State $20.00 for each of

the years 1897, 1898, 1899, and 1900, and a like sum for each of said years to the county of Hamilton.

That each of the other complainants owe the same sums as Stockard & Jones.

That all of the complainants should be held for proper penalties, costs, and attorneys' fees if they are held liable for such taxes.

The complainants contend that they are engaged exclusively in interstate commerce and are not bound for such privilege taxes; further, that the revenue laws of Tennessee applicable to "merchandise brokers" do not include these complainants, so as to make them subject to privilege taxes; but even if such laws do include complainants, yet they are inoperative and void as against complainants, who are engaged solely in interstate commerce.

18-22 R. B. COOKE, *Sol'r for Def'ts.*
R. P. WOODARD,
PRITCHARD & SIZER,
For Compl'ts.

Transcript of case of—

J. H. McREYNOLDS
vs.
CLINT MORGAN ET AL. } No. 8762.

Original Injunction Bill. Filed 23rd Day of March, 1900, at 9.30 A. M.

* * * * * * *

23 *Injunction Bond. Filed 23rd Day of March, 1900, at 9.30 A. M.*

Know all men by these presents that we, J. H. McReynolds, as principal, and B. A. Stockard, as surety, are held and firmly bound unto Clint Morgan and J. N. McCutcheon in the penal sum of five hundred and no $_{00}$ dollars; for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, or administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23rd day of M'ch, in the year of our Lord one thousand nine hundred, 1900.

The condition of the above obligation is such that whereas said principal obligor hath, the day of the date hereof, prayed for and obtained from the court of chancery, holden at Chattanooga, in the State of Tennessee, a writ of injunction, returnable to the chancery court, holden at Chattanooga, on the first Monday in April next:

Now, if the said principal obligor shall prosecute the said injunction with effect, or, in case he fails therein, shall well and truly pay and satisfy said obligee- or either of them all such costs and damages as may be awarded and recovered against the said obligors in any suit or suits which may be hereafter brought for wrongfully suing out of said injunction, and shall, moreover, abide by and perform such orders and decrees as the court may make in this case,
24 and pay such costs and damages as the court may order, then

the above obligation is to be void; otherwise to remain in full force and effect.

J. H. McREYNOLDS. [SEAL.]
B. A. STOCKARD. [SEAL.]

We hereby acknowledge and bind ourselves for the prosecution of the above suit and payment of all such costs as may be awarded on the final hearing thereof.

B. A. STOCKARD. [SEAL.]

* * * * * * *

Motion to Dismiss Bill. Filed 5th Day of April, 1900.

Now comes the defendants and move to dismiss the bill filed against them in this cause for want of equity on the face of the bill.

R. B. COOKE,
Sol'r for Defendants.

25–30 Transcript of case of—

W. G. OEHMIG
vs.
CLINT MORGAN ET AL. } No. 8764.

Original Injunction Bill. Filed 23rd Day of March, 1900, *at* 10.15.

* * * * * * *

31 *Injunction Bond. Filed 23rd Day of March,* 1900, *at* 10.15 *A. M.*

Know all men by these presents that we, W. G. Oehmig, as principal, and Thos. M. Carothers, as surety, are held and firmly bound unto Clint Morgan and J. N. McCutcheon in the penal sum of five hundred and no $_{00}$ dollars; for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, or administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23rd day of March, in the year of our Lord one thousand nine hundred, 1900.

The condition of the above obligation is such that whereas said principal obligor hath the day of the date hereof prayed for and obtained from the court of chancery holden at Chattanooga, in the State of Tennessee, a writ of injunction, returnable to the chancery court holden at Chattanooga on the first Monday in April next:

Now, if the said principal obligor shall prosecute the said injunction with effect, or in case he fails therein shall well and truly pay and satisfy the said obligee or either of them all such costs and damages as may be awarded and recovered against the said obligors in any suits or suit which may be hereafter brought for wrongfully suing out of said injunction, and shall, moreover, abide by and
32 perform such orders and decrees as the court may order, then

the above obligation to be void; otherwise to remain in full force and effect.

W. G. OEHMIG. [SEAL.]
THOS. M. CAROTHERS. [SEAL.]

We hereby acknowledge and bind ourselves for the prosecution of the above suit and payment of all such costs as may be awarded on the final hearing thereof.

THOS. M. CAROTHERS. [SEAL.]

* * * * * * *

Motion to Dismiss Bill. Filed 5th Day of April, 1900.

Now comes the defendants and move to dismiss the bill filed against them in this cause for want of equity on the face of the bill.

33–38 R. B. COOKE,
Sol'r for Defendant-.

Transcript of case of—

T. M. CAROTHERS
vs.
CLINT MORGAN ET AL. } No. 8765.

Original Injunction Bill. Filed 23rd Day of March, 1900, *at* 10.15 *A. M.*

* * * * * * *

39 *Injunction Bond. Filed 23rd Day of March,* 1900, *at* 10.15 *A. M.*

Know all men by these presents that we, T. M. Carothers, as principal, and W. G. Oehmig, as surety, are held and firmly bound unto Clint Morgan and J. N. McCutcheon in the penal sum of five hundred and no $_{00}$ dollars; for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, or administrators, jointly and severally, by these presents.

Sealed with our seals and dated the 23rd day of March, in the year of our Lord one thousand nine hundred, 1900.

The condition of the above obligation is such that whereas said principal obligor hath the day of the date hereof prayed for and obtained from the court of chancery holden at Chattanooga, in the State of Tennessee, a writ of injunction, returnable to the
40 chancery court holden at Chattanooga on the first Monday in April next:

Now, if the said principal obligor shall prosecute the said injunction with effect, or in case he fails therein shall well and truly pay and satisfy said obligee- or either of them all such costs and damages as may be awarded and recovered against the said obligors in any suits or suit which may be hereafter brought for wrongfully suing out of said injunction, and shall, moreover, abide by and perform such orders and decrees as the court may make in this case, and

pay such costs and damages as the court may order, then the above obligation to be void; otherwise to remain in full force and effect.

THOS. M. CAROTHERS. [SEAL.]
W. G. OEHMIG. [SEAL.]

We hereby acknowledge and bind ourselves for the prosecution of the above suit and payment of all such costs as may be awarded on the final hearing thereof.

W. G. OEHMIG. [SEAL.]

* * * * * * *

41–46 *Motion to Dismiss Bill. Filed 5th Day of April,* 1900.

Now comes the defendants and moves to dismiss the bill filed against them in this cause for want of equity on the face of the bill.

R. B. COOKE,
Sol'r for Defendant.

Transcript of case of—

J. H. ALLISON
vs.
CLINT MORGAN ET AL. } # 8770.

Original Injunction Bill. Filed 27th Day of March, 1900, *at* 10.20 *A. M.*

* * * * * * *

47 *Injunction Bond. Filed 27th Day of March,* 1900, *at* 10.20 *A. M.*

Know all men by these presents that we, J. H. Allison, as principal, and R. J. Ashford, as surety, are held and firmly bound unto Clint Morgan and J. N. McCutcheon in the penal sum of five hundred and no $_{00}$ dollars; for which —, well and truly to be
48 made, we bind ourselves and each of us, our and each of our heirs, or executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of March, in the year of our Lord one thousand nine hundred, 1900.

The condition of the above obligation is such that whereas said principal obligor hath the day of the date hereof prayed for and obtained from the court of chancery holden at Chattanooga, in the State of Tennessee, a writ of injunction, returnable to the chancery court holden at Chattanooga on the first Monday in April next:

Now, if the said principal obligor shall prosecute the said injunction with effect, or in case he fails therein shall well and truly pay and satisfy the said obligee- or either of them all such costs and damages as may be awarded and recovered against the said obligors in any suit or suits which may be hereafter brought for wrongfully suing out of said injunction, and shall, moreover, abide by and perform such orders and decrees as the court may make in this case, and pay such costs and damages as the court may order, then the

above obligation to be void; otherwise to remain in full force and effect.

J. H. ALLISON, [SEAL.]
By PRITCHARD. [SEAL.]
R. J. ASHFORD. [SEAL.]

We hereby acknowledge and bind ourselves for the prosecution of the above suit and payment of all such costs as may be awarded in the final hearing thereof.

R. J. ASHFORD. [SEAL.]

* * * * * * *

49 *Motion to Dismiss Bill. Filed 5th Day of April,* 1900.

Now comes the defendants and moves to dismiss the bill filed against them in this cause for want of equity on the face of the bill.

R. B. COOKE,
Sol'r for Defendants.

Final Decree. Enrolled 14th Day of May, 1900.

STOCKARD & JONES
vs.
CLINT MORGAN ET AL. } No. 8763.

J. H. MCREYNOLDS
vs.
CLINT MORGAN ET AL. } No. 8762.

W. G. OEHMIG
vs.
CLINT MORGAN ET AL. } No. 8764.

T. M. CAROTHERS
vs.
CLINT MORGAN ET AL. } No. 8765.

J. H. ALLISON
vs.
CLINT MORGAN ET AL. } No. 8770.

These consolidated causes came on to be heard before Chancellor McConnell on the bills, the answer of the defendants J. N. McCutcheon, county court clerk, and Clint Morgan; the petition of the State of Tennessee and Hamilton County, and the answer of the defendants therein, the agreed state of facts, and the entire record; and, after argument of counsel, the court is of opinion and decrees that the complainants in the several bills are entitled to the relief sought therein.

It is therefore ordered, adjudged, and decreed by the court that the complainants, Stockard and Jones, J. N. McReynolds, W. G. Oehmig, T. M. Carothers, and J. H. Allison, are not subject to the privilege tax, penalties, costs, and fees sought to be collected from them, and the injunction- granted under the several bills con-
50 solidated in this cause restraining the collection thereof are made perpetual.

It is further ordered, adjudged, and decreed by the court that the defendant Hamilton County pay all the costs of these consolidated causes, for which execution may issue.

From this decree petitioners, State of Tennessee and Hamilton County, pray an appeal to the next term of the supreme court to be held at Knoxville, Tennessee, on the 2nd Monday of September next, which is granted without bond.

51 *Rule Docket.*

Parties:

J. H. McReynolds
vs.
Clint Morgan and J. N. McCutcheon. } No. 8762.

Solicitors:

Rob't P. Woodard, Pritchard & Sizer, R. B. Cooke.

1900.

March 23, at 9.30 a. m. Original injunction bill filed to enjoin defendants from enforcing "distress warrants," &c.
" 23. Exhibit "A" attached to bill filed, being copy of distress warrant.
" 23. Prosecution bond—R. B. Stockard, surety—taken and filed.
" 23. Injunction bond—amount, $500; R. B. Stockard, surety—taken and filed.
" 23. Injunction issued to defendants, as prayed, and returned March 23, served by T. P. McMahan, D. S.
" 23. Copy bill, 1,500 words, and sps. to answer issued to Hamilton County for defendants.
" 26. Spa. to answer returned served by Thos. P. McMahan, D. S.
April 5. Motion to dismiss bill filed.
April term.
May 14. Final decree in No. 8763, v. 519.

52 *Rule Docket.*

Parties:

W. G. OEHMIG
vs.
CLINT MORGAN and J. N. McCUTCHEON. } No. 8764.

Solicitors:

Rob't P. Woodard, Pritchard & Sizer, R. B. Cooke.

1900.
March 23, at 10.15 a. m. Original injunction bill filed to enjoin defendants from enforcing "distress warrant."
March 23. Exhibit "A" attached to bill filed, being copy of distress warrant.
" 23. Prosecution bond—T. M. Carothers, surety—taken and filed.
" 23. Injunction bond—amount, $500; T. M. Carother-, surety—taken and filed.
" 23. Injunction issued to defendants, as prayed, and returned March 23, served by T. P. McMahan, D. S.
" 23. Copy of bill, 1,900 words, and spns. to answer issued to Hamilton County for def'ts.
" 26. Spa. to answer returned served by Thos. P. McMahan, D. S.
April 5. Motion to dismiss bill filed.
April term.
May 14. Final decree in No. 8763, v. 519.

53 *Rule Docket.*

Parties:

T. M. CAROTHERS
vs.
CLINT MORGAN and J. N. McCUTCHEON. } No. 8765.

Solicitors:

Rob't P. Woodard, Pritchard & Sizer, R. B. Cooke.

1900.
March 23, at 10.15 a. m. Original injunction bill filed to enjoin defendants from enforcing "distress warrant," &c.
March 23. Exhibit "A" attached to bill filed, being copy of "distress warrant."
" 23. Prosecution bond—W. G. Oehmig, security—taken and filed.
" 23. Injunction bond—amount, $500; W. G. Oehmig, surety—taken and filed.

March 23. Injunction issued to defendants, as prayed, and returned March 23, served by T. P. McMahan, D. S.
" 23. Copy of bill, 1,900 wds., and spa. to answer issued to Hamilton County for def'ts.
" 26. Spa. to answer returned served by Thos. P. McMahan, D. S.
April 5. Motion to dismiss bill filed.
April term.
May 14. Final decree in No. 8763, v. 519.

54 *Rule Docket.*

Parties:

J. H. ALLISON
vs.
CLINT MORGAN and J. N. McCUTCHEON. } No. 8770.

Solicitors:

R. P. Woodard, Pritchard & Sizer, R. B. Cooke.

1900.
March 27, 10.20 a. m. Original injunction bill filed to enjoin defendants from enforcing distress warrant, etc.
March 27. Exhibit "A" attached to bill filed, being copy of "distress warrant."
" 27. Prosecution bond—R. J. Ashford, surety—taken and filed.
" 27. Injunction bond—amount, $500; R. J. Ashford, surety—taken and filed.
" 27. Injunction issued to defendants, as prayed, and returned March 28, served by Thos. P. McMahan, D. S.
" 27. Copy of bill, 1,900 wds., and spa. to answer issued to Hamilton County for defendants.
" 28. Spa. to answer returned served by Thos. P. McMahan, D. S.
April 5. Motion to dismiss bill filed.
April term.
May 14. Final decree in 8763. V. 519.

55 *Rule Docket.*

Parties:

STOCKARD & JONES (viz., R. B. STOCKARD and R. C. Jones)
vs.
CLINT MORGAN and J. N. McCUTCHEON. } No. 8763.

Solicitors:

R. P. Woodard, Pritchard & Sizer, R. B. Cooke.

March 23, at 9 a. m. Original injunction bill filed to enjoin defendants from enforcing "distress warrants," etc.
March 23. Exhibit "A" attached to bill filed, being copy of "distress warrant."

March 23. Prosecution bond—J. H. McReynolds, surety—taken and filed.
" 23. Injunction bond—amount, $500; J. H. McReynolds, surety—taken and filed.
" 23. Injunction issued to defendant-, as prayed, and returned March 23, served by T. P. McMahan, D. S.
" 23. Copy bill, 1,850 words, and spa. to answer issued to Hamilton County for defendants.
" 26. Spa. to answer returned served by Thos. P. McMahan, D. S.
April 5. Motion to dismiss bill.
" 19. Agreement of parties consolidating cause and Nos. 8762, 6465, and '70, &c., filed.
" 19. Answer of defendants filed; notice given.
" 19. Petition of the State of Tennessee and Hamilton County filed.
" 19. No process issued, by order of R. B. Cooke, sol'r.
" 26. Answer of Stockard and Jones, W. G. Oehmig, J. H. McReynolds, T. M. Carothers, and J. H. Allison to petition filed; notice given.
May 1. Agreement of parties filed.
April term.
May 14. Final decree in favor of complainants making injunction perpetual, and judgment against Hamilton County for
56 costs. Appeal prayed and granted. V. 519.

57 *Execution Docket.*

Parties:

J. H. McREYNOLDS
vs.
CLINT MORGAN ET AL. } No. 8762.

Solicitors:

Rob't P. Woodard, Pritchard & Sizer.

1900—March 23, at 9.30 a. m.:

		Am't.
State tax		2.50
County tax		2.50
Filing bill, .25; pros. bond, .25; recording, .25; inj. bond, .50	1.25	
Recording, .25; injunction, 1.00; copy of bill, 1.50; spa. to ans., .75	3.50	
Motion, .25; judg't for costs, .25; docketing, .30; bill of cost-, .50	1.30	
		6.05
Sheriff's fee-:		
Thos. P. McMahan, D. S., serving inj., 2 def'ts	2.00	
Summoning 2 def'ts	2.00	
		4.00
		$15.05

April term, 14th May, 1900. Judgment against Hamilton County for costs.
" " 14th May, 1900. Decree making injunction perpetual. V. 519.
(Appealed. See No. 8763.)

58 *Execution Docket.*

Parties:

W. G. OEHMIG
vs.
CLINT MORGAN ET AL. } No. 8764.

Solicitors:

Rob't P. Woodard, Pritchard & Sizer.

1900—March 23, 1900, at 10.15 a. m.:

State tax		2.50
County tax		2.50
Filing bill, .25; pros. bond, .25; recording, .25; inj. bond, .50	1.25	
Recording, .25; injunction, 1.00; copy of bill, 1.90; spa. to ans., .75	3.90	
Motion, .25; judg't for costs, .25; docketing, .30; bill of cost-, .50	1.30	
		6.45

Sheriff fees:

Thos. P. McMahan, D. S., serving inj., 2 def'ts	2.00	
Summoning 2 def'ts	2.00	
		4.00
		$15.45

April term, 14th May, 1900. Judgment against Hamilton County for costs.
" " 14th May, 1900. Decree making injunction perpetual. V. 519.
(Appealed. See No. 8763.)

59 *Execution Docket.*

Parties:

T. M. CAROTHERS
vs.
CLINT MORGAN ET AL. } No. 8765.

Solicitors:

Rob't P. Woodard, Pritchard & Sizer.

1900—March 23, at 10.15 a. m.:

		Amount.
State tax		2.50
County tax		2.50
Filing bill, .25; pros. bond, .25; recording, .25; inj. bond, .50; recording, .25	1.50	
Injunction, 1.00; copy bill, 1.90; spa. to ans., .75; motion, .25	3.90	
Judgement for costs, .25; docketing, .30; bill of costs, .50	1.05	
		6.45
Sheriff fee-:		
Thos. P. McMahan, D. S., serving inj., 2 def'ts	2.00	
Summoning 2 def'ts	2.00	
		4.00
		$15.45

April term, 14th May, 1900. Judgment against Hamilton County for costs.

14 May, 1900. Decree making injunction perpetual. V. 519.

(Appealed. See No. 8763.)

60 *Execution Docket.*

Parties:

J. H. ALLISON
vs.
CLINT MORGAN ET AL. } No. 8770.

Solicitors:

Rob't P. Woodard, Pritchard & Sizer.

1900—March 27, at 10.20 a. m.:

State tax		2.50
County tax		2.50
Filing bill, .25; pros. bond, .25; recording, .25; inj. bond, .50; recording, .25	1.50	
Injunction, 1.00; copy of bill, 1.90; spa. to ans., .75; motion, .25	3.90	
Judg't for costs, .25; docketing, .30; bill of costs, .50..	1.05	
		6.45

Sheriff fees:

Thos. P. McMahan, D. S., serving inj., 2 def'ts.....	2.00	
Summoning 2 def'ts	2.00	
		4.00
		$15.45

April term, 14th May, 1900. Judgment against Hamilton County for costs.

" " 14th May, 1900. Decree making injunction perpetual. V. 519.

(Appealed. See No. 8763.)

61 *Execution Docket.*

Parties:

STOCKARD & JONES vs. CLINT MORGAN ET AL. } No. 8763.

Solicitors:

R. P. Woodard, Pritchard & Sizer.

1900—March 23, at 9.30 a. m.:

		Amount.
State tax		2.50
County tax		2.50
Filing bill, .25; pros. bond, .25; recording, .25; injunction bond, .50	1.25	
Recording, .25; injunction, 1.00; copy bill, 1.85; spa. to ans., .75.....	3.85	
Motion, .25; filing agreement, .25; filing ans., .25; notice, .25	1.00	
Filing pet., .25; filing ans. to pet., .25; notice, .25.....	.75	
Filing agreement, .25; final decree, .75; docketing, .30.....	1.30	
Bill of cost, .50.....	.50	
		8.65

Sheriff fee-:

Thos. P. McMahan, D. S., serving injunction, 2 def'ts.	2.00	
Summoning 2 def'ts	2.00	
		4.00
		$17.65

April term, 14th May, 1900. Judgment against Hamilton County for costs.

" " 14th May, 1900. Decree making injunction perpetual. V. 519.

Appealed.

Costs Incident to Appeal.

Transcript for supreme court, 20,750 wds.....	20.75
Seal, .50; expressage, .25; int. revenue, .10	.85
Total	$21.60

62 *Certificate of Clerk & Master.*

STATE OF TENNESSEE, }
Hamilton County. }

I, J. B. Ragon, clerk and master of the chancery court of said county, hereby certify that the foregoing sixty-two pages of words and figures comprise a full, true, and perfect transcript, as required by the rules of the supreme court, of all the records, pleadings, exhibits, and proceedings had by said court in the consolidated cause wherein Stockard and Jones are complainants and Clint Morgan *et al.* are defendants, as the same remain of record and on file in my office.

Witness my hand and the seal of said court, at office,
[SEAL.] in the city of Chattanooga, Tennessee, this the 12th day of July, 1900.

J. B. RAGON, *C. & M.*

(Stamp.)

63 STOCKARD & JONES *vs.* CLINT MORGAN ET AL. } No. 25, Supreme Court Docket.

Come the defendant-, by solicitors, and move the court to remand these consolidated causes to the docket of the supreme court, because the only questions involved are questions involving State and county revenue.

R. B. COOKE,
Sol'r for Def't-.

Brief.

The sole questions involved in these causes are whether or not the complainants, who are merchandise brokers, are liable to the State and county for privilege taxes.

See Transcript, page- 2, 3, and 11.

See Code (Shannon's), sec. 6321 and 6326.

R. B. COOKE,
Sol'r for Defendants.

64 *Brief and Assignment of Errors for Defendants.*

In the Supreme Court at Knoxville, Tennessee, September Term, 1900.

Filed Sept. 17, 1900. J. G. Stuart, D. C.

STOCKARD & JONES
vs.
CLINT MORGAN. } Consolidated Causes.

I.

Statement of Case.

These several bills, consolidated and heard as one cause, were filed to enjoin the collection of privilege taxes claimed for the years 1897, 1898, 1899, and 1900, against the complainants as merchandise brokers. All questions were eliminated, by agreement of parties, except:

1. Whether or not complainants are merchandise brokers and subjects by statute to tax as such.

2. Whether or not their business constitutes interstate commerce, and therefore lies beyond the reach of the State's taxing power.

The chancellor held that complainants were not liable for said privilege tax and enjoined its collection perpetually, and adjudged the costs against Hamilton County.

The defendants appeal.

II.

Assignment of Errors and Brief.

(1.)

The court erred in adjudging that complainants were not liable for said tax and in refusing to dismiss their bills.

Complainants are merchandise brokers; they are not engaged in interstate commerce.

The facts with reference to the character of business done by complainants are agreed upon and are as follows:

65 "It is agreed that the several complainants in the original bills, to wit, J. H. McReynolds, Stockard and Jones, W. G. Oehmig, T. M. Carothers, and J. H. Allison, are residents of Hamilton county, Tenn.

"That said J. H. McReynolds has been carrying on business in Chattanooga, said county and State, during the present year, 1900; that said Stockard and Jones, W. G. Oehmig, T. M. Carothers, and J. H. Allison have been carrying on business in said city during the years 1897, 1898, 1899, and 1900.

"That the character of said business so carried on by the respective complainants or the manner of conducting the business of each is and has been as follows:

"The complainant, as representative of non-resident parties, firms,

or corporations, solicits orders from jobbers or wholesale dealers in Chattanooga, Tenn., and when such orders are obtained sends them to his non-resident principal or principals. If an order is accepted, the goods are shipped by such non-resident principal or principals to the local jobber or wholesale dealer. Up to the time of the sale the goods in all instances belong to the non-resident principal or principals and are shipped to the State of Tennessee from another State.

"In making sales or soliciting orders for the goods, the complainant sometimes exhibits samples to the local jobber or wholesale dealer, and sometimes takes the order without showing a sample.

"Unless complainant has been previously authorized by principal or principals to sell at a fixed price, the orders are taken subject to acceptance or rejection by such non-resident principal or principals, who own the goods.

"At the end of each month or at stated periods the complainant is paid a commission by such non-resident principal or principals for goods previously sold on accepted orders; no commission is paid on orders taken but rejected. Complainant does not receive for his services any pay or salary from any local jobber or dealer or
66 resident of Tennessee, nor does he assume to represent, or represent or hold himself out as representing, any resident of Tennessee, or negotiate any sales of goods for residents of Tennessee. His principals are all residents of other States of the United States, and the goods sold are shipped from such other State to the State of Tennessee for delivery to buyers who reside in Tennessee.

"The complainant has an office or 'headquarters' in Chattanooga, Tenn., where he keeps samples, stationery, and other articles, but he travels around on foot daily or frequently in drumming or soliciting orders for goods, as before stated. His principals are specific parties, firms, or corporations, all non-residents of Tennessee and residents of other States in the United States, and he does not represent or hold himself out as representing the public in general, or negotiate or sell for any resident of Tennessee."

The statutes relating to this tax are:

Acts 1897, chap. N, p. 52.
Acts 1899, chap. 432, 1016, and possibly
Acts 1895, chap. 4 (extra session), p. 580.

There can be no question but that complainants are, under the facts stated, merchandise brokers. The precise question is decided *is decided* in Spears *vs.* Loague, 6 Cold., 421.

The revenue act of 1895 contained no special provision as to merchandise brokers, but embraced them under the general head of "brokers, other than real-estate," p. 580.

The act of 1897 made special provision for the taxation of merchandise brokers, in general terms, under the head "brokers, merchandise," as changed the general head to "brokers (other than real-estate or merchandise, and those paying taxes as bankers").

Pp. 52, 53.

The act of 1899 was the same as act of 1897, except that the term merchandise brokers was so extended as to include "sellers of merchandise to consumers upon samples or orders," as well as "agents engaged" in the business, p. 1016.

The complainants are not engaged in interstate commerce.

67 They are residents of the State, are engaged in the exercise of an occupation that is taxed as a privilege, and have an office from which they transact that business and exhibit samples.

They represent several firms and different lines of goods. They fall within the case of Fecklin *vs.* Taxing Dist., 145 U. S. L., and Memphis *vs.* Car-ington, 91 Tenn., 511.

They are clearly not within the cases of Robbins *vs.* Tax. Dist., 120 U. S., 489, and of Hurford *vs.* State, 91 Tenn., 671, and of State *vs.* Scott, 98 Tenn., 254.

In the Robbins case the tax was held to be on the non-resident principal. Robbins was a transient drummer representing one particular firm.

In the case at bar the tax is on a localized business done by citizens of the State and for no particular principal. In the Hurford and Scott cases the agents had no office and represented a single principal and for a specific line of goods.

The court said there was no similarity between that case and the Ficklin case, p. 676.

(2.)

The court erred in taxing Hamilton County, that was not a party, with the costs.

G. W. PICKLE,
Att'y Gen'l.

(The following was written in pencil at the bottom of the brief:)

It is worthy of note that the non-resident principals had the power to reject orders that the residents had taken and thereby reduce agent's commission.

PICKLE.

68 *Assignment of Errors and Brief for the State of Tennessee and Hamilton County.*

Filed Sept. 17, 1900. J. G. Stuart, D. C.

Supreme Court, Hamilton County, Tennessee.

STOCKARD & JONES
vs.
CLINT MORGAN ET AL. } Consolidated Causes — Equity.

Question Involved.

The sole question presented in this case is whether or not the complainants in these consolidated causes are liable for privilege taxes, as merchandise brokers, to the State of Tennessee and Hamilton county.

Statement of Facts.

The complainants in these consolidated causes, to wit, Stockard and Jones, J. H. McReynolds, W. G. Oehmig, T. M. Caruthers, and J. H. Allison, filed their original injunction bills against Clint Morgan, a constable, and J. N. McCutcheon, county court clerk of Hamilton county, Tennessee, charging that they had been engaged in the business of soliciting and taking orders from wholesale and jobbing merchants in Chattanooga, Tennessee, for goods to be sold them by non-resident parties; that they do not sell to consumers, and that they represent certain particular non-resident firms and corporations, claiming that they are engaged exclusively in interstate-commerce business, and that they had never applied for any license to carry on business in Hamilton county, Tennessee; that defendant, Clint Morgan, a constable of Hamilton county, was threatening to seize and sell their property under a distress warrant, issued by the county court clerk, for certain amounts claimed to be due from them to the State and county; that said distress warrant, neither on its face nor by endorsement, shows any revenue to be claimed for the State of Tennessee or Hamilton county; that it is vague and
69 indefinite and void for uncertainty.

See Trans., p. —.

The chancellor granted an injunction restraining the collection of said distress warrant-.

The defendants answered that said distress warrants were issued on motion of E. H. Williams, State revenue agent, against all of said complainants, who were alleged to be doing business as merchandise brokers in Hamilton county, Tennessee, without first having complied with the law requiring them to pay a privilege tax of $20 to the State of Tennessee and $20 to Hamilton county for each year for which they have conducted their business. Thereafter, on April 19, 1900, the State of Tennessee and Hamilton county, by E. H. Williams, State revenue agent, filed a petition in said consolidated causes, alleging that complainants are merchandise brokers, doing business in Hamilton county, Tennessee, and that they are liable to the State and county for privilege taxes for the years and in the amounts therein set out.

See Trans., p. 2.

Thereupon solicitors for complainants and defendants entered into an agreement that the question at issue is whether or not the complainants or any of them are liable for any privilege tax, and then it was agreed that the consolidated causes should be heard upon their merits, and that all questions which might affect the jurisdiction of the court were waived, and that the question of the regularity or irregularity of the distress warrants set out in the bill were also waived; and it was also agreed that E. H. Williams', State revenue agent's, right to commissions or fees should be the same as if he had brought suit for the taxes claimed.

See Trans., p. 10.

A further agreement of facts was filed on May 1st, 1900,
70 showing that the complainant, as the representative of non-resident firms or corporations, solicits orders of goods from jobbers or wholesale dealers in Chattanooga, Tennessee, and when such orders are obtained sends them to his non-resident principal or principals. If an order is accepted the goods are shipped by such non-resident principal or principals to the local jobber or wholesale dealer. Up to the time of the sale the goods in all instances belong to the non-resident principal or principals, and are shipped to the State of Tennessee from another State. In making sales or soliciting orders for the goods, the complainant sometimes exhibits samples and sometimes takes the orders without showing a sample.

Unless complainant has been previously authorized by his principals to sell at a fixed price, the orders are taken subject to acceptance or rejection by such non-resident principal or principals who own the goods.

At the end of each month or at stated periods the complainant is paid a commission by such non-resident principal or principals for goods previously sold on accepted orders. No commission is paid on orders taken but rejected.

Complainant does not receive for his services any pay or salary from any local jobber or dealer or resident of Tennessee, nor does he assume to represent, or represent or hold himself out as representing, any resident of Tennessee, or negotiate any sales of goods for residents of Tennessee; his principals are all residents of other States of the United States, and the goods sold are shipped from such other States to the State of Tennessee for delivery to buyers who reside in Tennessee.

The complainant has an office or headquarters in Chattanooga, Tennessee, where he keeps samples, stationery, and other articles, but he travels around on foot daily, and frequently in drumming or soliciting orders for goods, as before stated. His principals are specific parties, firms, or corporations, all non-residents of *of*
71 Tennessee and residents of other States in the United States, and he does not represent or hold himself out as representing the public in general, or negotiate or sell for any resident of Tennessee.

The defendants and solicitors for the State of Tennessee and Hamilton county contend that under the facts the complainants are merchandise brokers, and each of them is bound for privilege taxes under the laws of Tennessee. The complainants contend that they are engaged exclusively in interstate commerce and are not bound for such privilege taxes.

Further, that the revenue laws of Tennessee applicable to merchandise brokers do not include these complainants so as to make them subject to privilege taxes, but even if such laws do include the complainants, yet they are inoperative and void against complainants who are engaged solely in interstate commerce.

See Trans., pp. 15 to 17.

The chancellor held that the complainants were not subject to the privilege tax, penalties, costs, and fees sought to be recovered from them, and the injunction granted under the several bills in this cause, restraining the collection thereof, were made perpetual, and the costs were adjudged against Hamilton County, from which decree the State of Tennessee and Hamilton County prayed an appeal to the supreme court, and now come and assign the following errors to the holding of the chancellor:

Assignment of Errors.

It was error for the court to hold that complainants were not liable for the privilege taxes, penalties, costs, and fees and commissions sought to be collected from them as merchandise brokers for the following reasons:

The legislature of Tennessee has levied a privilege tax upon merchandise brokers, which should include, when the sale is made in the State, all sellers of merchandise to consumers upon orders or samples, and also all agents engaged in such business, in
72 cities, towns, and taxing districts of 20,000 to 50,000 or over, each, per annum, $20.00.

See Acts of 1899, chap. 432, p. 1016.

"A broker, within the meaning of the revenue laws, is an agent who negotiates sales between parties for commission, and a person who sells only stocks and bonds bought by himself is not a broker."

State *vs.* Duncan, 16 Lea, p. 75.

State *vs.* Nashville Sav. Bnk., 16 Lea, 118.

"Where a resident broker negotiates sales of goods between residents and non-residents, the business is not interstate commerce and the broker may be taxed."

Memphis *vs.* Carrington, 91 Tenn., 511.

Ficklin *vs.* Taxing District, 145 U. S., p. 1.

See also Harford *vs.* The State, 7 Pickle, 671.

"A privilege tax levied by the State authorities on those doing business within the State as brokers or commercial agents for firms living outside the State is not a tax on interstate commerce and is valid."

Ficklin *vs.* Taxing District, 145 U. S., p. 1, distinguishing Robins *vs.* Taxing District, 120 U. S., p. 489.

In the case of Memphis *vs.* Carrington, 7 Pickle, 511, Judge Lurton, in discussing the question of the liability of defendants for privilege tax, said:

"Upon careful consideration, we are of opinion that this tax is upon the privilege of opening and establishing an office or agency for the representation of foreign insurance companies. The insurance companies have not opened an office, but Messrs. Carrington, Masons and Sons have. * * * The doing of such business and

the conducting of such an agency is made a privilege. * * * The case of Ficklin *et al. vs.* Taxing District, decided by this court in 1889 and recently affirmed by the Supreme Court of the
73 United States, is in point as to the proper construction of this section. In that case it appeared that Ficklin was engaged in and doing business as a general merchandise broker, and as such was taxed under section 9, chapter 96, of the amended taxing district act of 1881. Claiming to represent only foreign principals, Ficklin resisted the tax upon the ground that it was a tax upon his principal- and as such a tax upon interstate commerce, and that the tax fell within the principle of the case of Robbins *vs.* The Taxing District, 120 U. S., 489. This court thought the case was to be distinguished, in that Robbins represented a single firm, as their agent or drummer, while Ficklin held himself out as a general merchandise broker, and that the tax was put upon the privilege or business of a general merchandise broker, and was made, therefore, in fact or in effect a tax upon the persons or firms represented by him. * * * This view was affirmed, the opinion not being yet reported. It is true that the question there was as to whether the tax was one upon interstate commerce, and that no such question can arise here, inasmuch as the business of insurance is not commerce."

L. & L. Fire Ins. Co. *vs.* Oliver, 10 Wal., 566.

"But the case is applicable, in that the taxes — held to be upon the agent personally and not one upon the persons represented by him."

In the case of Ficklin *vs.* Shelby County, Mr. Chief Justice Fuller in delivering the opinion of the court used the following language:

"In the case of Robbins the tax was held in effect not to be a tax on Robbins, but on his principals; while here the tax was clearly levied upon complainants in respect of the general commission business they conducted and their property engaged therein or their profits realized therefrom. No doubt can be entertained of the right of a State legislature to tax trades, professions, and occupations, in the absence of inhibition in the State constitution in that regard, and where a resident citizen (as are complainants in these
74 cases) engages in general business subject to a particular tax, the fact that the business done chances to consist for the time being wholly or partially in negotiating sales, between resident and non-resident merchants, of goods situated in another State does not necessarily involve the taxation of interstate commerce forbidden by the Constitution."

The distinction is clearly drawn in all the authorities between the business or occupation of a drummer and that of a merchandise broker, it being held that a tax on a drummer is a tax on his principal, and where he represents a non-resident principal that the tax constitutes an attempt to regulate interstate commerce, and is therefore void, while on the other hand it is clearly held that the privilege tax upon the business or occupation of the merchandise broker is not a tax upon his principals, but is a privilege tax levied upon the business or occupation of the merchandise broker, which busi-

ness or occupation the legislature has declared to be a privilege, and which cannot be construed into a tax upon the broker's non-resident principals nor into an attempted regulation or tax on interstate commerce.

It will be seen, from the agreed statement of facts filed in these causes, and from the statement of the case of Ficklin *vs.* Shelby County, that the two cases are absolutely identical.

From the agreed statement of facts filed in this cause it is clearly shown that the complainants are engaged in the general business of merchandise brokers, keeping an office or headquarters where they keep their samples, stationery, &c.; that they negotiate sales on their own responsibility, without the power to bind their non-resident principals, but make all sales subject to their approval as to prices charged.

See Trans., p. —.

They are therefore engaged in a merchandise brokerage business, and the fact that their principals are all non-residents of Tennessee does not bring them within the power of the interstate-commerce act, because, at any time they choose, they may commence to
75 represent resident principals, and as to whether their principals are residents or non-residents of the State can have no bearing in this case, because it is the general business of merchandise brokers which is declared to be a privilege by the legislature and taxed as such, and they are engaged in that business.

R. B. COOKE,
Sol'r for Appellants.

76 In the Supreme Court, at Knoxville.

STOCKARD & JONES
vs.
CLINT MORGAN ET AL. } Consolidated Causes.

From the chancery court of Hamilton county.

Reply Brief for Complainants.

The only questions involved in these cases is whether or not the complainants are subject to payment of a tax as "merchandise brokers" under the statutes of Tennessee. The salient facts to which we direct especial attention are:

(1.) That complainants represent solely non-resident parties, firms, and corporations, and neither represent, assume to represent, or hold themselves out as representing any residents of the State of Tennessee.

(2.) That they do not do business for any and all non-residents generally who may solicit or engage their services, but that each of the complainants represents only certain specific parties, firms, or corporations.

(3.) That complainants take orders for merchandise from residents

of Tennessee, which orders complainants forward to their non-resident principals, and, if the orders are accepted, the goods are shipped direct by the principals to the persons giving the orders. In all instances the goods at the time the orders are given are in another State, and are shipped into Tennessee in pursuance of the orders taken by complainants, if the orders are accepted.

(4.) That complainants sell only to jobbers and wholesale dealers and not to consumers.

(5.) That complainants are paid their compensation solely by the non-resident sellers by way of commissions on the orders sent in by them and accepted by their principals. They receive no compensation from the purchasers or parties by whom the orders are given.

It can scarcely be denied that the sale and shipment of goods from an owner in one State to a purchaser in another is inter-
77 state commerce, or that a person soliciting, as agent, in one State "the sale of goods on behalf of individuals or firms doing business in another State" is engaged in interstate commerce, and such occupation cannot be made the subject of taxation by the States. This was the exact point decided in Robbins *vs.* Shelby Taxing District, 120 U. S., 489.

The appellants, however, insist that this case is not governed by the rule laid down in the Robbins case and other kindred cases, and that the appellees were not engaged in interstate commerce, and they seek to differentiate this case from those belonging to the class of which the Robbins case is one on these grounds:

1. That the tax in question is not laid upon the sale of the goods or on the goods themselves or on the non-resident principals of the appellees, but that it is "upon the agents personally, and not upon the persons represented by him."

2. That the agents in these cases are all residents of the State of Tennessee, and not, as in the Robbins case, non-residents, and that therefore they are subject to the operation of the tax laws, as well as all other laws of this State.

3. That the appellees in these cases represented not a single principal each, but several principals, and that therefore, though all these principals are non-residents, they are engaged in the general business of merchandise brokers, and not in interstate commerce.

4. That complainants all had offices or "headquarters" in Chattanooga, Tennessee, where they kept samples, stationery, and other articles.

1. The proposition that a tax exacted from a person engaged in interstate commerce is not a restriction upon or interference with interstate commerce itself has been repeatedly declared unsound. In the leading case of Brown *vs.* Maryland, 12 Wheat., 419, the tax involved was one imposed by the State of Maryland on "all importers of foreign articles or commodities * * * and other persons selling the same by wholesale." It was contended on behalf of the State that this act did not "impose a tax on the importation of foreign goods or on the trade and occupation of an im-
78 porter; but the tax is imposed upon the trade and occupation of selling foreign goods by wholesale after they have been

imported. It is a tax upon the profession or trade of the party when that trade is carried on within the State. It is laid upon the same principle with the usual taxes on retailers, or innkeepers, or hawkers and peddlers, or upon any other trade exercised within the State."

But the Supreme Court, through Mr. Chief Justice Marshall, held the contention unsound.

"But * * * it is still argued that this is not a tax upon the article, but on the person. The State, it is said, may tax occupations, and this is nothing more. It is impossible to conceal from ourselves that this is varying the form without varying the substance. * * * All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself. It is true that the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanics must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it; so a tax on the occupation of an importer is in like manner a tax on importation. It must add to the price of the article and be paid by the consumer or by the importer himself in like manner as a direct duty on the article itself would be *made*. This the State has not a right to do, because it is prohibited by the Constitution."

12 Wheat., 444.

So in the case of Walton *vs.* Missouri, 91 U. S., 275, a license tax on persons selling goods, wares, and merchandise not the growth, product, or manufacture of the State was sought to be maintained as a tax upon a calling and not upon the goods themselves; but the court said that "where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the
79 power of the State to levy, it matters not whether it be raised directly from the goods or indirectly from them through the license to the dealer; but if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license."

In Leloup *vs.* Port of Mobile, 127 U. S., 640, 643, the court said: "Ordinary occupations are taxed in various ways, and in most cases legitimately taxed; but we fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business *it* a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business."

In McCall *vs.* California, 136 U. S., 104, a tax imposed by the statutes of California on railroad agencies was held a tax on interstate commerce, in so far as it applies to an agent in San Francisco of a corporation operating a railroad from Chicago to New York, where the duties of the agent were to induce people contemplating a trip

east to travel over the line he represented. The court held that this agency was one of the "means" employed by the railroad company to increase its business; that the railroad was engaged in interstate commerce, and therefore the tax was "upon a means or an occupation of carrying on interstate commerce, pure and simple."

The case of Brennan *vs.* Titusville, 153 U. S., 289, involved the validity of an ordinance requiring agents soliciting orders on behalf of manufacturers of goods to take out a license and pay a tax therefor. The court held that when enforced against such an agent within the State soliciting orders for a manufacturer of goods in another State the ordinance imposed a tax upon interstate commerce, in violation of the provisions of the Constitution of the United States.

"That this license is a direct burden on interstate commerce is not open to question."

153 U. S., 302.

The case of State *vs.* Scott, 98 Tenn., 254, is to the same effect. The question here involved was as to the validity of a statute imposing a tax on "persons other than photographers of this State soliciting pictures to be enlarged outside of this State."

80 This court held:

(1.) That the enlargement of pictures referred to in the statute was interstate commerce.

(2.) That though no tax was in terms laid upon the business of enlarging pictures, or the principals engaged in it, or upon the product, but only on the soliciting agents, yet it was in effect a tax upon the principals, and hence upon their business.

(3.) That, this business being interstate commerce, the State had no right to put any burden upon it, or to regulate or interfere with it in any way, and therefore the statute was void.

2. The facts that complainants were all residents of Hamilton county, Tennessee, cannot be material to the question under consideration. The ground on which such a tax as is here in question is held to be invalid is that it is an attempt to interfere with interstate commerce and is in effect a tax on such commerce; and manifestly the objection applies just as strongly where the person against whom the tax is nominally assessed is a resident of the State as where he is a non-resident. If it were true, as insisted by appellants, that the tax is a personal one against the broker, there might be some force in this contention; but, in view of the holding that such taxes are in fact imposed on the business of interstate commerce, we submit that it makes no difference whether the agents sought to be taxed are residents of the State or not. As a matter of fact, in a large majority of the cases where the validity of such a tax has been brought in question the person nominally taxed seems to have been a resident of the State by which the tax was imposed. Thus in Brown *vs.* Maryland, *supra*, it is, we think, manifest from the opinion that the plaintiff in error was a resident of Maryland. He was certainly indicted and convicted in that State, and it nowhere appears that he was not a resident, so it may at least be said

that the question of the place of his residence was immaterial. The same is true of Welton *vs.* Missouri, 91 U. S., 275.

In Leloup *vs.* Port of Mobile, 127 U. S., 640, the plaintiff in error was the managing agent at Mobile for the Western Union Telegraph Co., and was indicted and convicted in the circuit court of
81 Mobile for refusing to pay the tax in question. It is fair to infer that he was a resident of that place.

In McCall *vs.* San Francisco, 136 U. S., 104, the plaintiff in error was "an agent in the city and county of San Francisco," and it was sought to sustain the validity of the tax on the ground that it was a "license tax for the privilege of maintaining an agency in the city of San Francisco."

In Brennan *vs.* Titusville, 153 U. S., 289, it was insisted on behalf of the defendant in error that, as there was nothing in the record to show that plaintiff in error was not a resident of Pennsylvania, the State in which the tax was imposed and in which the conviction was had, "the presumption therefore is that he was a citizen and resident of Pennsylvania." From the fact that the court in its opinion did not notice this contention, it must be inferred that it was not considered material.

It is true that in Robbins *vs.* Shelby Taxing District, 120 U. S., 489, the statement of facts showed that Robbins was a resident of another State, but no stress is laid on that fact in the opinion, nor does the decision in any way depend upon it.

It is no doubt true that every person is, within constitutional limits, subject to the laws of the State in which he resides, and must pay such taxes as are imposed on him by those laws; but as no State can tax interstate commerce directly, so it cannot do so indirectly, and it makes no difference whether the medium through which it seeks to do so is one of its own citizens or a citizen of some other State. Adverting again to the case of State *vs.* Scott, *supra*, the tax, while in terms laid on the agent, is in effect imposed on the non-resident principals and on the business they are engaged in, and, that business being interstate commerce, the tax is illegal.

3. Neither can it be material, as we submit, that the complainants or any of them represented more than one non-resident each, if such were the facts. The stipulation on which these cases were tried in the court below does not show that any one of the complainants did in fact represent more than one principal, and we do not think it can be assumed that they did. Conceding, however, for
82 the sake of the argument, that the facts are as contended by appellants, we do not see how they would alter the case. If the soliciting of orders in this State for one non-resident is interstate commerce, or a means of carrying on interstate commerce, it would seem that soliciting orders for two or more non-residents would not be the less so. It is no doubt frequently the case that the business of one non-resident is not sufficient to take all the time of the resident agent, or that a single non-resident cannot afford to pay for the entire time of a resident drummer or broker. In such cases does the mere fact that the agent undertakes to and does solicit orders for two or more principals, or that two or more non-residents agree to em-

ploy the same agent, each paying a proportionate share of his salary or commission, change the character of the business done by the agent, so that while it would be interstate commerce if he represented only one principal, it became intrastate commerce if he represents two? We can see no reason for such distinction and have found no authority to support it. On the contrary, there is direct authority against it, as we will hereafter show.

4. The fact that complainants kept an office or headquarters in this State, where they kept their samples, stationery, etc., does not change the character of their business. It is not contended that complainants or their principals kept any goods for sale in this State, but, on the contrary, it is expressly stipulated that they did not. The offices or headquarters were, therefore, nothing more than mere conveniences for the agents, and did not change the character of the business they did. In the following cases, among others, the opinions show that the plaintiffs in error kept an office in the State in which the tax was imposed.

Leloup *v.* Port of Mobile, 127 U. S., 640.
McCall *vs.* California, 136 U. S., 104.
Norfolk & Western R. R. Co. *vs.* Pennsylvania, 136 U. S., 114.
Crutcher *vs.* Kentucky, 141 U. S., 47.

5. It is insisted, however, on behalf of appellants that the Supreme Court of the United States has settled the question here involved adversely to the appellees in the case of Ficklin *vs.* Shelby
83 County, 145 U. S., 1; but we think that an examination of that case will clearly disclose that is entirely different from this one. The facts involved in that case were that complainants were established and did business as general merchandise brokers in Memphis, and paid the tax imposed by law on merchandise brokers, and received a general and unrestricted license to do business as such brokers. They were liable under the act to pay not only a privilege tax, which they did pay, but also a percentage on the amount of commissions received from their business. This percentage they refused to pay, and filed a bill to enjoin the collection of it, averring that they were not legally subject to payment of the tax; that one of the complainants negotiated sales exclusively for non-residents of the State of Tennessee, and that nine-tenths of the sales negotiated and effected by the other complainants were also for non-resident firms. The Supreme Court said:

"We agree with the supreme court of the State that the complainants, having taken out licenses under the law in question to do a general commission business, and having given bond to report their commissions during the year, and to pay the required percentage thereon, could not, when they applied for similar licenses for the ensuing year, resort to the courts because the municipal authorities refused to issue such licenses without the payment of the stipulated tax. What position they would have occupied if they had not undertaken to do a general commission business and had taken out no licenses therefor, but had simply transacted business for non-resident

principals, is an entirely different question, which does not arise upon this record."

145 U. S., 24.

From this opinion Mr. Justice Harlan dissented. In the subsequent case of Brennan *vs.* Titusville, 153 U. S., 289, 306, the court say that no departure is intended in the Ficklen case from the rule "so firmly established" by the other cases which we have heretofore cited, but that "the case was near the boundary line of the State's power." Explaining that case, the court said that, as the tax imposed was for the privilege of doing a general commission business within the State, and as the State had granted complainants
84 the privilege for a stipulated price, it would be "refining too much" to release them from the obligations of their bonds merely because it happened that during the year they had sold only to non-residents; that the tax was an entirety, and when plaintiffs applied for their licenses at the beginning of the year they assumed the whole liability imposed by the State, and as a party having paid a license tax could not, on failure to do any business, sue for and recover back the tax, so the plaintiffs, having sought and obtained the privilege of doing a general commission business, which the State might properly license, could not refuse to pay the sum they had agreed to pay on the ground that they had not exercised the privilege.

We do not think that the Ficklen case, especially as explained in the Brennan case, in any way sustains the contention of the appellants in this case.

6. The case of Stratford *vs.* City Council of Montgomery, 110 Ala., 619, is exactly "on all fours" with this case. The facts, as shown in the report of the case, were that the plaintiff in error was a resident citizen of Montgomery, Alabama; that he kept an office or place of business there for exhibiting samples and carrying on correspondence; that he solicited and received orders from wholesale and retail merchants of Alabama for the purchase of goods from several non-resident wholesale dealers who lived and carried on business in other States; that orders taken by him were subject to the approval of the principals, and if accepted he was entitled to a commission thereon, to be paid by the seller. The goods at the time the contracts for sale were made were the property of the non-resident principals and were in other States. The city of Montgomery, being properly authorized by its charter to do so, passed an ordinance requiring a license of $50 per annum from "local commercial brokers," and prohibiting under penalty the carrying on of the business of "local commercial broker" without payment of the license. The plaintiff in error, having failed to pay the tax, was arrested, convicted, and fined for violating this ordinance, and appealed to the Supreme Court. That court held:

(1.) That plaintiff in error was a "commercial broker" within the meaning of the ordinance.

85 (2.) That, as he represented only non-resident principals in negotiating sales of merchandise which at the time was situated in other States, the ordinance in question could not be applied

to him without violating the commerce clause of the Constitution of the United States, and therefore he was not liable to the tax in question.

In this case the court reviews both the Ficklen case and the Brennan case, and differentiates the former from the case before it on the ground that while "the business of defendant was general, so as to constitute him a broker, it by no means follows that it required he should also take local business. He might, as he did, confine himself to interstate business and still be a 'broker' without becoming liable to the tax."

We submit that the decree of the chancellor was correct, and that it should be affirmed.

ROB'T P. WOODARD,
PRITCHARD & SIZER,
Sol'rs for Appellees.

86 Filed September 29, 1900. J. G. Stuart, D. C.

STOCKARD & JONES
vs.
CLINT MORGAN.

Opinion.

This cause and those heard with it involve three questions: First, Are the complainants merchandise brokers within the meaning of the Tennessee revenue law imposing a tax on such brokers? second, Does the tax apply to them? and, third, If it has such application, is it a valid constitutional statute and not obnoxious to the interstate-commerce clause of the Federal Constitution?

The question of fact we decide affirmatively. We content ourselves on this point with reference to the agreed facts without reciting them, and to the very discriminating application of the law thereto in an almost precisely similar case decided by the supreme court of Alabama at its Nov. term, 1895.

110 Ala., 619, Stratford *vs.* City of Montgomery.

We hold that the law applies to complainants and is not unconstitutional.

In the Alabama case cited the court shows very clearly the distinction that exists between a mere agent of a foreign principal and a merchandise broker whose business is conducted on the line of sales for foreign and to domestic patrons. After drawing this distinction with great force and clearness the Alabama court holds that such brokers stand in the same non-taxable relation as do mere agents, and that a privilege tax on the exercise of such a business is a tax on interstate commerce.

We do not think so. The law does not discriminate. The tax is on the privilege of doing such a business in the State without regard to the customers sought or principal represented.

The thing taxed is the occupation of merchandise brokerage, not

the business of those employing, whether they be domestic or foreign principals. The principals secured by the brokers are at their option. The law confines them to neither foreign or domestic. It authorizes the business in this State, protects it, and reasonably taxes it for such permission and protection.

It gives to such business the right of competition with other
87 privileged occupations, and charges those engaged in it only as it charges others—reasonably and proportionately to the respective advantages of each. To hold otherwise would be to declare that there could be no tax on the occupation of merchandise brokerage unless those employed in it should appear to confine their business done here to representation of special principals.

We think the view here taken — in accord with that expressed by this court in Ficklen *vs.* Shelby Co. Taxing District, affirmed by the Supreme Court of the United States, 145 U. S., 1.

The decree of the chancellor is therefore reversed and bill dismissed with cost.

SNODGRASS, *C. J.*

Final Decree.

MONDAY, *October* 15, 1900.

Court met pursuant to adjournment.

Present and presiding: The Hon. Chief Justice D. L. Snodgrass and the Hon. Associate Justices W. C. Caldwell, John S. Wilkes, W. K. McAlister, and W. D. Beard.

The minutes of Saturday were read and signed, when the following proceedings were had, to wit:

STOCKARD & JONES *vs.* CLINT MORGAN ET AL. } Reversed, Dismissed, and Remanded.

This cause came on to be heard on this 15th day of October, 1900, before the hon. supreme court of Tennessee, at Knoxville, on the transcript of the record from the chancery court of Hamilton county, Tennessee, and upon assignments of errors and briefs of defendants and reply briefs of complainants, and the court is of opinion that the chancellor's decree is erroneous, and doth reverse the same and dismiss the several bills of the complainants.

It is therefore adjudged and decreed that the bills in these several causes be dismissed and the injunctions granted therein dissolved and the defendants recover of the complainants in each cause and of their sureties on their prosecution bonds all the costs of the causes. The costs appropriate to each case will be taxed separately in that case, and execution will issue accordingly.

On the hearing of these causes the chief contention of com-
88 plainants was that the business in which they were engaged was interstate commerce, and that they were protected from State legislation by the commerce clause of the Federal Constitution; but the court held they were not so protected.

It is further adjudged and decreed that these causes be remanded to the chancery court of Hamilton county, to the end that a proper reference may be had for damages upon the injunction bonds.

And to all of the foregoing decree the complainants except.

89 *Costs Incident to Writ of Error to Supreme Court of U. S.*

Clerk Alex. McMillan:

Bond for writ of error, .75; filing citation, .25; filing petition, .25; filing writ of error, .25; filing ass'm't of errors, .25; taxing cost, .50	$2.25
Transcript cost, $33.30; seal, .50; rev. stamp, .10	33.90
	$36.15

90 *Petition for Writ of Error.*

Filed Oct. 17, 1900. Alex. McMillan, Clerk.

In the Supreme Court of the State of Tennessee, at Knoxville, Tenn.
In Equity.

STOCKARD & JONES
v.
CLINT MORGAN ET AL.

To the Honorable David L. Snodgrass, chief justice of the supreme court of the State of Tennessee:

The petition of B. A. Stockard and R. C. Jones, composing the firm of Stockard & Jones; J. H. McReynolds, W. G. Oehmig, T. M. Carothers, and J. H. Allison respectfully shows that on the — day of October, 1900, the supreme court of the State of Tennessee rendered a decree against your petitioners in certain consolidated cases, under the style of Stockard & Jones *v.* Clint Morgan *et al.*, in which several cases your petitioners were complainants and Clint Morgan and J. N. McCutcheon were defendants, denying your petitioners the relief sought under said bills, dismissing their said bills, and adjudging the costs against them and awarding execution therefor, as will fully appear by reference to the record and proceedings in said consolidated causes under the style aforesaid; and your petitioners show that said supreme court is the highest court of said State of Tennessee in which a decision in said suit can or could be had.

And your petitioners now claim the right to remove said decree and proceedings to the Supreme Court of the United States by writ of error under the statutes of the United States authorizing writs of error to State courts, and especially under section 709 of the Revised Statutes of the United States, because in said causes, your petitioners being the complainants therein, there was drawn in question the validity of statutes of the State of Tennessee and the authority exercised thereunder, on the ground of their being repugnant to the Constitution and laws of the United States, and the decision of the said supreme court was in favor of their validity, and because certain

rights, privileges, and immunities were claimed by your petitioners under the Constitution of the United States, and the decision
91 was against the right, privilege, or immunity claimed by your petitioners under such Constitution. Your petitioners claim that they were protected by the commerce clause of the Constitution of the United States from taxation under the revenue laws of the State of Tennessee, and the decision of the said Supreme Court was averse to their contention and in favor of the validity of the statute imposing the tax and against the immunity and protection asserted and claimed by your petitioners, and a decree was rendered against your petitioners, as aforesaid, all of which will fully appear by reference to the record and proceedings in said cause.

Wherefore your petitioners pray the allowance of writ of error, returnable into the Supreme Court of the United States, to operate as a supersedeas, and for a citation to the defendants; and they will ever pray, etc.

B. A. STOCKARD.
R. C. JONES.
J. H. McREYNOLDS.
W. G. OEHMIG.
T. M. CAROTHERS.
J. H. ALLISON.

R. P. WOODARD,
ROBERT PRITCHARD,
J. B. SIZER, *Solicitors.*

Writ of error allowed as prayed, to operate as a supersedeas; bond fixed at $1,500.00.

Citation will issue as prayed for.

This October 17th, 1900.

D. L. SNODGRASS,
Chief Justice of the Supreme Court of Tennessee.

92 *Writ of Error.*

Filed October 17, 1900. Alex. McMillan, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Tennessee, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between B. A. Stockard and R. C. Jones, composing the firm of Stockard & Jones; J. H. McReynolds, W. G. Oehmig, T. M. Carothers, and J. H. Allison, complainants and plaintiffs in error, and Clint Morgan and J. N. McCutcheon, defendants and defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United

States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said B. A. Stockard and R. C. Jones, composing the firm of Stockard & Jones; J. H. McReynolds, W. G. Oehmig, T. M. Carothers, and J. H. Allison, plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in the said Supreme
93 Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 17th day of October, in the year of our Lord 1900.

[The Seal of the Circuit Court, District of East Tenn.]

HENRY P. EWING, *Clerk*,
By J. T. CARTER,
Deputy Clerk of the U. S. Court for the Eastern District of Tennessee.

Allowed by Hon. David L. Snodgrass, chief justice of the supreme court of Tennessee, and allowed to operate as a supersedeas this 17th day of October, 1900.

D. L. SNODGRASS,
Chief Justice of the Supreme Court of the State of Tennessee.

94 Filed October 17, 1900. Alex. McMillan, Clerk.

Know all men by these presents that we, Stockard & Jones, a firm composed of B. A. Stockard and R. C. Jones; T. M. Carothers, J. H. McReynolds, W. G. Oehmig, and J. H. Allison, as principals, and Rob't P. Woodard and Pritchard & Sizer, as sureties, are held and firmly bound unto Clint Morgan and J. *H.* McCutcheon in the full and just sum of fifteen hundred dollars, to be paid to the said Clint Morgan and J. N. McCutcheon, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be

made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of October, in the year of our Lord nineteen hundred.

Whereas lately, at a session of the supreme court of the State of Tennessee, in a suit pending in said court between Stockard and Jones, T. M. Carothers, W. G. Oehmig, and J. H. Allison, complainants, and Clint Morgan and J. N. McCutcheon, defendants, a decree was rendered against the said Stockard and Jones, T. M. Carothers, J. H. McReynolds, W. G. Oehmig, and J. H. Allison, and the said above-named complainants and plaintiffs in error having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Clint Morgan and J. N. McCutcheon, citing and admonishing them to be and appear at the United States Supreme Court, to be holden at the city of Washington within thirty days from the date hereof:

Now, the condition of the above obligation is such that if the said Stockard and Jones, T. M. Carothers, J. H. McReynolds, W. G. Oehmig, and J. H. Allison shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

STOCKARD & JONES.
THOS. M. CAROTHERS.
J. H. McREYNOLDS.
W. G. OEHMIG,
J. H. ALLISON,
ROB'T P. WOODARD. *Suret-*.
PRITCHARD & SIZER, *Sureties.*

Sealed and delivered in presence of—
CRAWFORD JOHNSON.
E. L. COOK.

Approved and allowed, to operate as supersedeas, by—
D. L. SNODGRASS,
Chief Justice of the Supreme Court of Tennessee.

95 *Citation & Acknowledgement of Service.*

UNITED STATES OF AMERICA, *ss:*

To Clint Morgan and J. N. McCutcheon, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the city of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Tennessee, at Knoxville, Tennessee, in a case wherein B. A. Stockard and R. C. Jones, composing the firm of Stockard & Jones; J. H.

McReynolds, W. G. Oehmig, T. M. Carothers, and J. H. Allison are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David L. Snodgrass, chief justice of the supreme court of the State of Tennessee, this the 17 day of October, in the year of our Lord 1900.

D. L. SNODGRASS,
Chief Justice of the Supreme Court of the State of Tennessee.

We acknowledge service of the within and foregoing citation and of the writ of error therein mentioned for and on behalf of the defendants in error, Clint Morgan and J. N. McCutcheon, this 17 day of October, 1900.

G. W. PICKLE,
Solicitor for Defendants in Error.

Filed Oct. 17, 1900.

ALEX. McMILLAN, *Clerk.*

96 *Assignments of Error.*

In the Supreme Court of Tennessee.

STOCKARD & JONES
v.
CLINT MORGAN ET AL.

Assignment of errors.

And now come B. A. Stockard and R. C. Jones, partners under the firm name of Stockard & Jones; J. H. McReynolds, W. G. Oehmig, T. M. Carothers, and J. H. Allison, complainants and plaintiffs in error, by their solicitors, and respectfully represent that they feel themselves to be aggrieved by the proceedings and decree of the supreme court of the State of Tennessee in the above-entitled cause, and they assign errors thereto as follows, to wit:

I.

That the said court erred in finding and decreeing that the said complainants were not entitled to the relief sought in and by their said bills, and in denying them such relief, and in dismissing their said bills with costs.

II.

That the court erred in finding and adjudging that the said several complainants were liable for the privilege tax assessed against merchandise brokers under the statutes of the State of Tennessee and were not protected therefrom by clause 3, sec. 8, art. I, of the Constitution of the United States.

III.

That the court erred in finding and adjudging that said several complainants were not engaged in interstate commerce within the meaning of said clause of the Constitution of the United States, so as to be protected thereby from privilege taxation under the statutes of the State of Tennessee.

IV.

That in the chancery court held at Chattanooga, in Hamilton county, Tennessee, being the court which had and exercised
97 original jurisdiction of the said several suits consolidated under the style of Stockard & Jones *v.* Clint Morgan and others, said several complainants, being the appellants herein, specially set up and claim that they were engaged exclusively in commerce between the States, and that they were entitled to immunity from taxation on such business under the statutes and revenue laws of the State of Tennessee, and question the validity of the statutes of Tennessee imposing or purporting to impose any tax upon the privilege of their said business, and questioning the validity of the authority exercised under such statutes upon the ground of their being repugnant to the Constitution and laws of the United States upon the subject of commerce between the States, and the decision of the said chancery court at Chattanooga, in Hamilton county, Tennessee, was against the validity of said statutes and the authority exercised thereunder so far as they affected said complainants and in favor of the immunity claimed by appellants; but upon appeal to the said supreme court of the State of Tennessee, the decision of the supreme court was in favor of the validity of the said statutes and the authority exercised thereunder and against the privilege and immunity claimed by the said complainants under the said Constitution and laws of the United States, and particularly under the commerce clause of said Constitution; and said complainants say that the said supreme court erred in deciding in favor of the validity of said statutes of the State of Tennessee and of the authority exercised thereunder and against the rights, privileges, and immunities so set up and claimed by said complainants under the aforesaid provisions of the Constitution of the United States.

Wherefore the said Stockard & Jones, J. H. McReynolds, W. G. Oehmig, T. M. Carothers, and J. H. Allison, complainants in error, pray for writ of error, to the end that the Supreme Court of the United States may examine and correct the errors assigned in said findings and decree of the supreme court of Tennessee, and
98 for a reversal of the decree entered by the supreme court of

the State of Tennessee in the above-entitled case; and they will ever pray, etc.

B. A. STOCKARD,
R. C. JONES,
J. H. McREYNOLDS,
W. G. OEHMIG,
J. H. ALLISON,
T. M. CAROTHERS,
By PRITCHARD, *Sol.*

R. P. WOODARD,
ROBERT PRITCHARD,
J. B. SIZER, *Solicitors.*

99 Office of the clerk of the supreme court for the eastern division of Tennessee.

I, Alex. McMillan, clerk of said court, do hereby certify that the foregoing comprises a full, true, and correct copy of the transcript and of all the proceedings had in the cause of Stockard & Jones *et al.* *vs.* Clint Morgan *et al.*, at its September term, 1900, as the same appear of record and on file in my office, and also that the original citation, writ of error, and assignments of error are attached hereto.

In testimony whereof I have hereunto set my hand and the seal of the court, at office, in Knoxville, Tenn., on this the 26th day of October, 1900.

[Seal of the Supreme Court, Knoxville, Tenn.]

ALEX. McMILLAN, *Clerk.*

{ Ten-cent United States internal revenue stamp, canceled Oct. 26, 1900. A. McM. }

100 In the Supreme Court of the United States under Writ of Error to the Supreme Court of Tennessee.

STOCKARD & JONES ET AL. *v.* CLINT MORGAN ET AL. } Stipulation of Counsel Concerning the Portions of the Record to be Printed.

The parties appellant and defendant, by their respective solicitors, agree as follows:

I.

That separate bills of complaint were filed by the several complainants—that is to say, one bill was filed by Stockard and Jones, a firm composed of B. A. Stockard and R. C. Jones; another by T. M. Carothers; another by J. H. McReynolds; another by W. G. Oehmig, and another by J. H. Allison—all for the same purpose and against the same defendants, Clint Morgan and J. N. McCutcheon, and that the charges of the several bills were substantially identical. These bills were consolidated under the style of Stockard & Jones *v.* Clint Morgan *et al.* Only one bill, that of Stockard & Jones *v.* Clint Morgan *et al.*, shall be printed.

II.

The following papers shall be omitted from the printed record:
(*a.*) The prosecution bonds executed by the complainants in the chancery court at Chattanooga, Tennessee, p. 1.
(*b.*) The subpœnas to answer issued from said chancery court, p. 9, 2432, 4049.
(*c.*) The writs of injunction issued from said chancery court, p. 9, 2432, 4048.
(*d.*) The appeal bond executed by the defendants on appeal from said chancery court to the supreme court of Tennessee.
The printed portions of the record, with the omissions aforesaid, together with this stipulation, shall be submitted to the Supreme Court of the United States as the record in this case.
This October 29, 1900.

R. P. WOODARD,
ROBERT PRITCHARD,
J. B. SIZER,
Sol'rs for Pl't'ffs in Error.
G. W. PICKLE,
Att'y Gen'l and Sol'rs for D'f'ts.

101 [Endorsed:] Stipulation of counsel as to printing of record. Stockard & Jones *et al.*, appellants, *v.* Clint Morgan *et al.* Pritchard & Sizer, attorneys-at-law, rooms 314, 315, & 316 Temple court, Chattanooga, Tenn.

102 [Endorsed:] File No., 17,971. Supreme Court U. S., October term, 1900. Term No., 486. B. A. Stockard *et al.*, P. E., *vs.* Clint Morgan *et al.* Stipulation as to printing record. Filed Nov. 21, 1900.

Endorsed on cover: File No., 17,971. Tennessee supreme court. Term No., 195. B. A. Stockard and R. C. Jones, composing the firm of Stockard & Jones; J. H. McReynolds, W. G. Oehmig, T. M. Carothers, and J. H. Allison, plaintiffs in error, *vs.* Clint Morgan and J. N. McCutcheon. Filed November 21st, 1900.

No. 1976.

Brf. of Pritchard, Sims & Woodard

Filed Oct 26, 1901.

Brief for Plaintiffs in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 196.

B. A. STOCKARD AND R. C. JONES, COMPOSING THE FIRM OF STOCKARD & JONES; J. B. McREYNOLDS, W. G. OEHMIG, T. M. CAROTHERS, AND J. H. ALLISON, PLAINTIFFS IN ERROR,

vs.

CLINT MORGAN AND J. N. McCUTCHEON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

STATEMENT, ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFFS IN ERROR.

ROBERT PRITCHARD, J. B. SIMS, AND R. P. WOODARD,
COUNSEL FOR PLAINTIFFS IN ERROR.

(17,071)

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 195.

B. A. STOCKARD, *et al.*,
Plaintiffs in Error,
vs.
CLINT MORGAN AND ANOTHER.

In Error to Supreme Court of Tennessee.

STATEMENT, ASSIGNMENT OF ERRORS, BRIEF, AND ARGUMENT ON BEHALF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

There were five separate bills filed in the Chancery Court at Chattanooga, Tennessee, against the defendants in error, to enjoin the collection of privilege taxes alleged to be due the State of Tennessee and Hamilton County from the several complainants; but, by agreement, the five cases were consolidated and heard together.
Rec. pp. 2-5; 7.

The Chancellor was of opinion that the complainants were entitled to the relief sought, and decreed accordingly. (Rec. 17-18.) But upon appeal to the Supreme Court of Tennessee, the decree of the Chancellor was reversed, and it was decreed that complainants' several bills be dismissed.
Rec. pp. 41-42.

Thereupon the original complainants brought the case to this Court by writ of error.
Rec. pp. 42-46.

There was no controversy as to the facts; they were agreed to be substantially as follows:

The several plaintiffs in error, except J. H. McReynolds, had been carrying on business in Chattanooga, Hamilton County, Tennessee, since and including the year 1897; McReynolds had only carried on business there during the year 1900. They were separately engaged in the same business. As the representatives of firms or corporations which were residents and citizens of States other than Tennessee, plaintiffs in error solicited orders for goods from wholesale dealers doing business in Chattanooga. These orders for goods were sent by plaintiffs in error to their non-resident principals, who might accept or reject them. If an order was accepted, the goods were shipped by the non-resident principal to the local wholesale dealer. Up to the time of the sale, the goods, in every case, belonged to the foreign principal, and were shipped into the State of Tennessee from another State.
Rec. p. 12

At the end of every month, or at other stated periods, the several plaintiffs in error were paid commissions by their foreign principals for goods previously sold on accepted orders; no commissions were paid on orders taken by the plaintiffs in error and rejected by their foreign principals. No plaintiff in error received for his services any compensation or salary from any local dealer or any resident of Tennessee, nor did he assume to represent, or represent, any resident of Tennessee, or negotiate any sale of goods between residents of Tennessee. All goods were sold for shipment and delivery from another State to buyers in Tennessee.

Rec. p. 12.

The several plaintiffs in error have offices or "head-quarters" in Chattanooga, Tennessee, where they keep samples of goods, etc.; but they travel around on foot "drumming the trade", or soliciting orders for goods as above stated. Their principals are certain known foreign firms or corporations doing business in other States, and the plaintiffs in error do not represent the trade or dealers generally.

Rec. p. 12.

The defendants in error contend that the several plaintiffs in error are liable to the State of Tennessee and Hamilton County for privilege taxes as "merchandise brokers" under the statutes of Tennessee, as follows:

That J. H. McReynolds should pay a privilege tax for 1900 of $20 to the State and $20 to the County;

That each of the other plaintiffs in error should pay to the State $20 per year for 1897, 1898, 1899 and 1900, and like sums to Hamilton County for those years;

That the several plaintiffs in error are also liable for penalties, costs and attorneys' fees, if they are liable for such taxes.

The contention of the plaintiffs in error is that they are engaged exclusively in interstate commerce and are not bound for such privilege taxes; that the revenue acts of Tennessee taxing "merchandise brokers" were not designed to embrace them, and that if they do apply to them, the acts are inoperative and void.

The statutes of the State of Tennessee under which it is claimed the plaintiffs in error are liable for privilege taxes, so far as they relate to this matter, are as follows:

An act entitled "An Act to provide Revenue for the State of Tennessee and the Counties thereof," being Chapter 2, Acts 1897, contains the following provisions:

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the taxes on every $100 worth of property shall be 40 cents for the year 1897, and for every subsequent year thereafter, 25 cents of which shall be for State purposes and 15 cents for school purposes.

"SEC. 2. *Be it further enacted*, That the several county courts of this State be and they are hereby authorized and empowered to levy an annual county tax on every $100 worth of taxable property not exceeding the State tax and exclusive of the tax for public roads and pikes and schools and interest on county debts and other

special purposes, and each county and municipality in this State is hereby authorized and empowered to levy a privilege tax upon merchants and other avocations named in this Act and declared to be privileges, not exceeding in amount that levied by the State for State purposes.

"SEC. 3. *Be it further enacted*, That all merchants shall pay an *ad valorem* tax upon the average capital invested by them in their business of 40 cents on the $100, 25 cents of which shall be for State purposes and 15 cents of which shall be for school purposes; and the privilege tax of 15 cents on each $100 worth of taxable property, 7½ cents of which shall be for school purposes and 7½ cents for State purposes: *Provided*, that such privilege tax without regard to the length of time they do business shall in no case be less than $5, which $5 is to be paid when the license is taken out; and in case of those whose privilege tax amounts to more than $5, the $5 paid shall be a credit when the balance of the taxes is paid.

SEC. 4. *Be it further enacted*, That the rate of taxation on the following privileges shall be as follows, and the following are hereby declared to be privileges:

* * * * * * * * *

"*Brokers, Merchandise.*

"In cities, towns, and taxing districts of 20,000 inhabitants or over, each, per annum $15 00
Of from 10,000 to 20,000, each, per annum 10 00
All of those under 10,000, each, per annum ..... 5 00"
Acts 1897, Ch. 2, pp. 50-51, 52.

An act entitled "An Act to provide Revenue for State, County, and Municipal Purposes," being Chapter 432, Acts 1899, contains the following provisions:

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the taxes on every $100 worth of property shall be 50 cents for the year 1899, and for every subsequent year thereafter, 35 cents of which shall be for State purposes and 15 cents for school purposes. That there shall be levied and collected a collateral inheritance tax as provided for in Chapter 174 of the Acts of 1893.

"SEC. 2. *Be it further enacted*, That the several county courts of this State be, and they are hereby, authorized and empowered to levy an annual county tax on every $100 worth of taxable property not exceeding 30 cents upon the hundred dollars worth of property, and exclusive of the tax for public roads and pikes and schools and interest on public debts, and other special purposes. And each county and municipality in this State is hereby authorized and empowered to levy a privilege tax upon merchants and such other avocations, occupations or businesses as are named in this act and declared to be privileges, not exceeding in amount that levied by the State for State purposes. The imposition of a privilege tax under this act shall not be construed as a release or exemption from an ad valorem tax unless otherwise expressly pro-

vided. Nor shall this act be construed as repealing any special act heretofore passed imposing a privilege tax.

"SEC. 3. *Be it further enacted*, That all merchants shall pay an ad valorem tax upon the average capital invested by them in their business of 50 cents on the $100; 35 cents of which shall be for State purposes, and 15 cents shall be for school purposes, and a privilege tax of 15 cents on each $100 worth of taxable property, 7½ cents of which shall be for school purposes, and 7½ cents for State purposes: Provided, that such privilege tax, without regard to the length of time they do business, shall in no case be less than $5, which $5 is to be paid when the license is taken out, and in case of those whose privilege tax amounts to more than $5, the $5 paid shall be a credit when the balance of the tax is paid; Provided further, That said $5 shall be equally divided between the State and counties.

"SEC. 4. *Be it further enacted*, That each vocation, occupation and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the county court clerk as provided by law for the collection of revenue.

* * * * * * * * *

"*Brokers—Merchandise.*

"Which shall include, when the sale is made in the State, all sellers of merchandise to consumers upon orders or samples, and also all agents engaged in such business.

"In cities, towns, and taxing districts of 50,000 inhabitants or over, each, per annum $30 00

"In cities, towns, and taxing districts of 20,000 to 50,000 inhabitants, each, per annum 20 00

"In cities, towns, and taxing districts of 10,000 to 20,000 inhabitants, each, per annum 15 00

"In cities, towns, and taxing districts of less than 10,000 inhabitants, each, per annum ..... 7 50"

Acts 1899, Ch. 432, pp. 1010-1011, 1016.

The Supreme Court of Tennessee decided that the plaintiffs in error are merchandise brokers within the meaning of the foregoing acts, and that the acts are not obnoxious to the interstate commerce clause of the Federal Constitution. This decision was placed upon the ground that the thing taxed is the business of merchandise brokerage, and not the business of the foreign principal employing the local agent.

Rec. pp. 40-41.

And, as before stated, there was decree accordingly, denying the relief sought and dismissing the bills with costs.

Rec. p. 41.

ASSIGNMENT OF ERRORS.

The plaintiffs in error assign the following errors:

I.

That the Supreme Court of Tennessee erred in finding and decreeing that the plaintiffs in error were not entitled to the relief sought in and by their said bills of complaint, and in dismissing their bills with costs.

II.

That the said Court erred in finding and decreeing that the plaintiffs in error were liable for the privilege taxes assessed against merchandise brokers under the statutes of the State of Tennessee, and were not protected therefrom by clause 8, Sec. 8, Art. I., of the Constitution of the United States.

III.

That the Court erred in finding and adjudging that the several plaintiffs in error were not engaged in interstate commerce within the meaning of said clause of the Constitution of the United States, so as to be protected thereby from privilege taxation under the statutes of the State of Tennessee.

IV.

That in the Chancery Court held at Chattanooga, in Hamilton County, Tennessee, being the court which had and exercised original jurisdiction of the said several suits consolidated under the style of Stockard & Jones vs. Clint Morgan and others, said several complainants, being the plaintiffs in error herein, specifically set up and claimed that they were engaged exclusively in commerce between the States, and that they were entitled to immunity from taxation on such business under the statutes and revenue laws of the State of Tennessee, and questioned the validity of the statutes of Tennessee imposing or purporting to impose any tax upon the privilege of their said business, and questioned the validity of the authority exercised under such statutes upon the ground of their being repugnant to the Constitution and laws of the United States upon the subject of commerce between the States, and the decision of the said Chancery Court at Chattanooga, in Hamilton County, Tennessee, was against the validity of said statutes and the authority exercised thereunder so far as they affected said complainants and in favor of the immunity claimed by appellants; but upon appeal to the said Supreme Court of the State of Tennessee, the decision of the Supreme Court was in favor of the validity of the said statutes and the authority exercised thereunder and against the privilege and immunity claimed by the said complainants under the said Constitution and laws of the United States, and particularly under the commerce clause of said Constitution; and plaintiffs in error say that the said Supreme Court erred in deciding in favor of the validity of said statutes of the State of Tennessee and of the authority exercised thereunder and against the rights, privileges, and immunities so set up and claimed by plaintiffs in error under the aforesaid provisions of the Constitution of the United States.

BRIEF.

1. The Tennessee statutes 1897, ch. 2, and 1899, ch. 432, do not embrace the plaintiffs in error:

(*a*) While the Tennessee Act 1897, ch. 2, imposes a tax on "merchandise brokers" generally, it contains no language necessarily embracing or expressly taxing such merchandise brokers as are engaged exclusively in interstate commerce. It should be construed to tax only those subject to State taxation.

[Paragraph (*a*) above applies to the Act of 1899, ch. 432, as well as to the Act of 1897, ch. 2.]

(*b*) The Tennessee Act 1899, ch. 432, imposes a tax on "sellers of merchandise to consumers, upon orders or samples, and on all agents engaged in such busines, where the sale is made in the State." The plaintiffs in error do not sell to consumers, and they do not complete sales of goods; they take orders from local wholesale merchants, but their foreign principals may accept or reject any order; if an order is accepted the principals ship the goods from another State to the merchant in Tennessee, and the local merchant sells to consumers and others.

2. But if the Tennessee statutes 1897, ch. 2, and 1899, ch. 432, do include and tax the plaintiffs in error, the acts are unconstitutional to that extent, because they interfere with and impose a burden on commerce among the States.

(*a*) The negotiation of the sale of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce, and a State cannot require a license, or exact a tax, as a condition precedent to negotiating the sale.

Robbins *vs.* Shelby County Taxing District, 120 U. S. 489;
Leloup *vs.* Port of Mobile, 127 U. S. 640.

(*b*) The exacting of a license tax as a condition to doing any particular business is a tax on the occupation, and a tax on the occupation of doing the business is a tax on the business.

Brown *vs.* Maryland, 12 Wheat. 419;
Welton *vs.* Missouri, 91 U. S. 275;
Robbins *vs.* Shelby Co. Tax. Dist., 120 U. S. 489;
Leloup *vs.* Port of Mobile, 127 U. S. 640;
McCall *vs.* California, 136 U. S. 104;
Brennan *vs.* City of Titusville, 153 U. S. 269.

(*c*) This case presents a very different question from that presented in *Ficklen vs. Shelby County Taxing District*, 145 U. S. 1. These plaintiffs in error have not taken out licenses, and have not done a general brokerage business. They have acted as agents for certain non-resident principals, and have done no local or general business, and are not subject to State taxation.

See 145 U. S. 24;
Brennan *vs.* City of Titusville, 153 U. S. 289, 306.

(*d*) In the case at bar the Supreme Court of Tennessee followed

the Alabama Supreme Court in holding that a similar statute applied to a precisely similar state of facts, and held that the privilege tax in question was imposed upon the plaintiffs in error. But the Alabama court held further that the statute was unconstitutional because it violated the commerce clause of the Federal Constitution. The Tennessee court, on the contrary, held the statute valid because it was a tax on the *occupation of merchandise broker*. This we submit was error.

Stratford *vs.* City Council of Montgomery, 110 Ala. 619.
Cases cited *supra*, 2 *b*.

(*e*) That plaintiffs in error reside in Hamilton County, Tennessee, and have offices or headquarters for the convenience of their business, are immaterial circumstances, not inconsistent with the fact that their business is exclusively interstate commerce.

Leloup *vs.* Port of Mobile, 127 U. S. 640;
McCall *vs.* San Francisco, 136 U. S. 104;
Norfolk & Western R. R. Co. *vs.* Pennsylvania, 136 U. S. 114;
Crutcher *vs.* Kentucky, 141 U. S. 47;
Brown *vs.* Maryland, 12 Wheat. 419;
Welton *vs.* Missouri, 91 U. S. 275;
Brennan *vs.* City of Titusville, 153 U. S. 289.

ARGUMENT.

Conceding that the plaintiffs in error are "merchandise brokers," the question remains whether the Tennessee statutes were intended to embrace *all* merchandise brokers, or only such as were not engaged in interstate commerce; and whether the distinction taken by the Tennessee Supreme Court between a tax on the vocation or business of merchandise brokerage and a tax on the "business of the foreign principal employing the local agent," is sound. In other words, if the Tennessee statutes do embrace the plaintiffs in error, does the distinction indicated by the State Supreme Court relieve the statutes of the objection that they are obnoxious to the commerce clause of the Federal Constitution?

It would perhaps serve no purpose to argue that the acts in question were not intended to embrace and tax the plaintiffs in error. The Supreme Court of Tennessee have said the acts do apply to them; that the tax is imposed upon them. The question left is whether the law is valid.

Still, it may be worth while to call attention to the fact that the act of 1897, ch. 2, contains no reference to the particular character of the business of the "merchandise brokers" upon whom it imposes the privilege tax. It provides that certain "avocations named in the act and declared to be privileges," shall be subjects of taxation, (sec. 2), and proceeds to provide that "merchandise brokers" shall pay privilege taxes, graduated by the population of the cities or towns in which they do business, (sec. 4), but the act makes no reference to the character of the business intended to be taxed, whether foreign or domestic.

The act of 1899, ch. 432, is to the same effect, substantially, except the following marked distinction: It declares that the term "merchandise brokers" "shall include, when the sale is made in this State, all sellers of merchandise to consumers upon orders or samples, and also all agents engaged in such business." (Sec. 4.)

It would seem clear that in order to hold that this act applies to the business of a "merchandise broker," it would have to appear (1) that the *sale* was made in the State of Tennessee, and (2) that the sale was to a *consumer* upon order or sample. We think it may fairly be controverted that the sales of merchandise by plaintiffs in error were made and completed in Tennessee. The broker, according to the agreed state of facts, merely solicited and received the order and transmitted it to his principal in another State for acceptance or rejection; and, if accepted, the principal "made the sale" and shipped the goods to the local wholesale dealer. No sales were made to "consumers upon orders or samples," or otherwise.

The added language of the act that "all agents engaged in such business" shall be subject to the tax, does not enlarge the class of business to which the act is applicable. To be subject to the tax the "agent" must be "engaged in such business," *i. e.*, the business of "selling merchandise to consumers upon orders or samples." The act taxes the "seller" and the "agent," but taxes no seller or agent unless engaged in the business of selling merchandise directly to consumers. And none of the plaintiffs in error were

sellers or agents for sellers of merchandise to consumers.

It would seem, therefore, that the act of 1899, ch. 432, can have no application to the plaintiffs in error. The original act of 1897 contains no limiting or explanatory language and is broad enough to cover any sale of goods in one State for shipment and delivery in another, *no matter how clearly a transaction of interstate commerce*, unless, in construing the statute we adopt that construction which will save it, and apply it only to proper subjects of State taxation, rather than a construction which will make it obnoxious to the commerce clause of the Constitution.

But passing this question, and treating it as conceded that the State of Tennessee has undertaken to levy this privilege tax upon the plaintiffs in error and others situated as the agreed state of facts shows them to be, we respectfully insist that the effort to tax them is void, and that the attempt to save the statutes from the charge of unconstitutionality by saying that they do not discriminate between foreign and domestic business, but tax the occupation of merchandise brokerage and not the business of those employing, whether foreign or domestic, is unsound and ineffectual.

The words of the statute are hardly susceptible of any construction that would make the suggested defense against unconstitutionality available. The act of 1897 simply taxes "*merchandise brokers*," saying nothing about "sellers" or "agents." The act of 1899 in terms applies to persons engaged in merchandise brokerage, and taxes "sellers" and "agents." The act of 1897 simply taxes the "privilege." The act of 1899 taxes as privileges "each vocation, occupation and business" thereinafter named, declaring them to be privileges.

The Supreme Court of Tennessee says "the law does not discriminate;" that it taxes the occupation, or business of merchandise brokerage, and does not confine the broker to foreign or domestic principals.

Rec. pp. 40–41.

That "the law does not discriminate" is no answer to our objection. It ought to discriminate: if it fail to do so, it is void so far as it invades the domain of interstate commerce. Commerce among the States cannot be taxed at all by a State, even though the same tax be laid on commerce carried on wholly within the State.

Robbins *vs.* Shelby County Taxing District, 120 U. S. 489.

We do not understand it to be denied, or at this day to be open for discussion, that the negotiation by sample in one State, of the sale of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.

Robbins *vs.* Shelby County Taxing District, 120 U. S. 489;
Corson *vs.* Maryland, 120 U. S. 502;
Leloup *vs.* Port of Mobile, 127 U. S. 640;
Barne *vs.* Burnside, 121 U. S. 186;

Ashor *vs.* Texas, 128 U. S. 129;
Leisy *vs.* Hardin, 135 U. S. 100;
Brennan *vs.* City of Titusville, 153 U. S. 289;
Ficklen *vs.* Shelby County Taxing District, 145 U. S. 1.

But it is said that the tax in question is laid upon the localized business of merchandise brokers in Tennessee, and that the validity of the tax is not affected by the circumstance that these particular brokers only had foreign principals.

This, we submit, is a begging of the question. If the business done by the broker is interstate commerce, the circumstance that the broker only conducts his business in one town, and the other circumstance that he has an office, are alike immaterial.

The unsoundness of the proposition that the exacting of a tax upon an occupation or business is not an interference with interstate commerce, if the business conducted be itself interstate commerce, has frequently been exposed by this court.

In the leading case of *Brown vs. Maryland*, 12 Wheat. 419, it was contended, substantially as decided by the Supreme Court of Tennessee in this case, that a statute of the State of Maryland did not impose the tax upon the occupation or trade of the importer, but upon the occupation of selling foreign goods after they had been imported; that "the tax was upon the profession or trade of the party when that trade is carried on within the State, and laid upon the same principle with the usual taxes on retailers, on innkeepers, on hawkers and peddlers, or upon any other trade exercised within the State."

But this Court, speaking through Mr. Chief Justice Marshall, answered this contention as follows:

"It is impossible to conceal from ourselves that this is varying the form without varying the substance. . . . All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself. It is true that the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it; so a tax on the occupation of an importer is in like manner a tax on importation. It must add to the price of the article and be paid by the consumer or by the importer himself in like manner as a direct duty on the article itself would be paid. This the State has not a right to do, because it is prohibited by the Constitution." 12 Wheat, 444.

Other cases are to the same effect. In *Welton vs. Missouri*, 91 U. S. 275, 278, this Court said:

"Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If once a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license of the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less

invalid because enforced through the form of a personal license.'

In *Leloup vs. Port of Mobile*, 127 U. S. 640, 645, this Court said:

"Ordinary occupations are taxed in various ways, and in most cases legitimately taxed; but we fail to see how a State can tax a business occupation without taxing the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business."

To the same effect are the utterances of the Court in

McCall *vs.* California, 136 U. S. 104;

Brennan *vs.* City of Titusville, 153 U. S. 289.

And these cases have been followed by the Supreme Court of Tennessee in *State vs. Scott*, 98 Tenn. 254, which involved the validity of a statute imposing a tax on "persons other than photographers of this State soliciting pictures to be enlarged outside of the State." It was *held* (1) that the business mentioned in the statute was interstate commerce; (2) that although the tax was not laid on the business or the principals engaged in it, but only on the soliciting agents, yet it was in effect a tax upon the non-resident principals, and, hence a tax on their business; and (3) that this business being interstate commerce, the State had no power to put a burden upon it, or to regulate or interfere with it in any way, and therefore the statute was void.

These cases seem to effectually dispose of the point made in the opinion of the Supreme Court of Tennessee in this case, to the effect that the tax is upon the occupation of the agent, unless it can be shown that in some way this case differs from those cited, and that a tax may be laid upon the business of the broker who solicits orders for his foreign principal without affecting the business of the principal whose goods are the subject matter of the transaction. It is not conceivable how this can be true: the volume and value of the business of the foreign firm which sells only through the local agent must necessarily be diminished if the right of the agent to solicit orders be interfered with. And however the matter may be viewed, the result is the same: it is the business of the principal that ultimately bears the burden of the loss.

But it is said the broker may select his own principals: that the statute does not confine him to either foreign or domestic principals. This is true, and it would be a complete answer to the complaint of one who had secured the State's license to do a general brokerage business and had then elected to act only for foreign principals. He could not be heard to complain. That was the question presented to this Court in the case of *Ficklen vs. Shelby County Taxing District*, 145 U. S. 1. But the case now presented is very different. The plaintiffs in error have not taken the State's license to do a general brokerage business, and, after being authorized to act as agents for either foreign or domestic principals, elected to act for foreign principals only. They have not done a general brokerage business: they have not asked or been granted the State's permission to do it. They say that because their business is limited to certain foreign principals for whom alone they

solicit orders, and because they are engaged in interstate commerce exclusively, they do not need the State's permission to conduct that business, and that it will be time enough for the State to demand its tax when they seek permission to do a general brokerage business.

And in *Ficklen vs. Shelby County*, *supra*, this Court has recognized the distinction contended for by us. After holding that general merchandise brokers who had taken out licenses to do business could not enjoin the collection of license taxes on the ground that they had chosen to act for foreign principals only, the Court say,—

"What position complainants would have occupied if they had not undertaken to do a general commission business and had taken out no licenses therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record."

145 U. S. 24.

In the subsequent case of *Brennan vs. City of Titusville*, 153 U. S. 289, 306, this Court said that the *Ficklen* case, even on the facts it presents, was "near the boundary line of the State's power," and that it was not intended as a departure from the doctrine "so firmly established" by the authorities already cited. Explaining the *Ficklen* case, this Court said that the tax in that case was imposed for the privilege of doing a general merchandise business; that the complainants after obtaining licenses and giving bonds, and after availing themselves of the benefit of their licenses, refused to comply with their bond to account for and pay taxes on commissions, upon the ground that most of their commissions had been on sales of goods forwarded by non-resident principals. The Court further said:—

"It was held that the tax was an entirety, and was not affected by the variable and adventitious results of business from year to year. It could hardly be contended that if the license tax exacted in advance for the privilege of engaging in such business was a fixed sum, a party paying the tax could, on a failure to secure and do any business, recover the tax so paid, for the tax is not for the business done, but for the privilege of engaging in business. So, when the plaintiffs in that case applied for their licenses at the beginning of the year, they assumed the whole liability imposed by the State. That all of it was not paid at once did not affect the measure of liability. Suppose the tax, a fixed sum, had been payable one-half at the commencement and the other half at the close of the year, would it be thought that, having paid the first half at the commencement of the year, they could resist payment of the second half on the ground that half of their commissions were received on goods shipped from outside the State? In other words, the tax imposed was for the privilege of doing a general commission business within the State, and whatever were the results pecuniarily to the licensees, or the manner in which they carried on business, the fact remained unchanged that the State had, for a stipulated price, granted them this privilege. It was thought by a majority of the Court that to release them from the obligations of

their bonds on account of the accidental results of the year's business was refining too much, and that the plaintiffs who had sought the privilege of engaging in a general business should be bound by the contracts which they had made with the State therefor. In the opinion in that case, by the Chief Justice, the authorities which are referred to in this opinion were cited, and the general rule was announced as is here stated. We only refer thus at length to that case to show the distinction between it and this case, and to notice that in the opinion was reaffirmed the proposition that 'no State can levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on.'"
153 U. S. 307-308.

Even if, standing alone, the *Ficklen* case could be considered authority for the conclusion reached by the Supreme Court of Tennessee in the present case, it certainly cannot be so regarded when read in connection with the *Brennan* case.

Upon facts not distinguishable in any particular from the facts in this case, the Supreme Court of Alabama reached a conclusion directly opposite to that reached by the Supreme Court of Tennessee in the case at bar, upon the legal question involved.

We refer to the case of *Stratford vs. City Council of Montgomery*, 110 Ala. 619, and rely upon it as being in accord with the decisions of this Court and as directly supporting our contention. In the opinion in the case at bar, the Tennessee Court refer to the Alabama case as "a very discriminating application of the law in an almost precisely similar case." But the Tennessee Court proceed to say: "In the Alabama case cited, the Court shows very clearly the distinction between a mere agent of a foreign principal and a merchandise broker whose business is conducted on the line of sales for foreign and to domestic patrons. After drawing this distinction with great force and clearness, the Alabama Court holds that such brokers stand in the same non-taxable relation as do mere agents, and that a privilege tax on the exercise of such a business is a tax on interstate commerce. We do not think so. The law does not discriminate. The tax is on the privilege of doing such a business in the State without regard to the customers sought or principals represented."
Rec. p. 40.

This is the way in which the Alabama case is disposed of. No effort to meet its reasoning is made: the only reason assigned by the Tennessee Court for not following it is that the Court thinks the tax is on "the privilege of doing business"; but the authorities we have cited show that this, in the language of Chief Justice Marshall, is merely "varying the form without varying the substance."

It seems that while the Tennessee Court approve the Alabama decision as "a discriminating application of the law to an almost precisely similar case" and thus follow it to the extent of holding

that the statutes imposing the tax apply to merchandise brokers, they refuse to follow it in holding that the business done by the plaintiffs in error is interstate commerce, and that, therefore, the statutes are void so far as they seek to tax it.

Stratford vs. City Council of Montgomery, *supra*, presents the exact question now presented—the question which this Court said in the Ficklen case was "an entirely different" one from the question presented by the record in that case: and the Supreme Court of Alabama, recognizing the distinction which the Supreme Court of Tennessee refuse to recognize, hold that the different facts produce a different result, and that a merchandise broker engaged exclusively in interstate commerce is not subject to taxation. "His business may be general, so as to constitute him a broker, but it by no means follows that it requires he should take local business. He might confine himself to interstate business and still be a "broker," without becoming liable to the tax."

110 Ala. 619, 628.

And the Alabama Court very properly say that a judicial construction of the Federal Constitution being involved, the decisions of this Court are of controlling authority.

Ib.

We respectfully submit that the conclusion reached by the Alabama Court is the correct conclusion, and that the Supreme Court of Tennessee erred in reaching a different result.

Nothing can be predicated of the fact that the plaintiffs in error are all residents of Hamilton County, Tennessee: it is not a question of residence, but of business; and a resident may be engaged in interstate commerce as exclusively as a non-resident.

This Court has never treated the circumstance that the person engaged in interstate commerce was a citizen of the State in which he was engaged in business, as being at all material, or as excluding him from protection against illegal taxation.

In *Robbins vs. Shelby County Taxing District*, 120 U. S. 489, the plaintiff in error was a resident of another State, but no stress is laid on that fact, and the decision in no way depends upon it.

On the other hand, it is clearly inferable, although not expressly stated in all of them, that the plaintiffs in error in the following cases were residents of the States in which they did business:

Brown *vs.* Maryland, 12 Wheat. 419;
Welton *vs.* Missouri, 91 U. S. 275;
Leloup *vs.* Port of Mobile, 127 U. S. 640;
McCall *vs.* San Francisco, 136 U. S. 104;
Brennan *vs.* City of Titusville, 153 U. S. 289.

Neither does the fact that the several plaintiffs in error had offices or "headquarters," where they kept their samples and stationery, change the nature of their business. They kept no goods for sale.

In the following cases, among others that might be cited, it appears the plaintiffs in error kept offices in the States in which the tax was imposed.

Leloup *vs.* Port of Mobile, 127 U. S. 640;
McCall *vs.* California, 136 U. S. 104;
Norfolk & Western R. R. Co. *vs.* Pennsylvania, 136 U. S. 114;
Crutcher *vs.* Kentucky, 141 U. S. 47.

Respectfully submitted,

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Supreme Court of the United States.

No. 195.—October Term, 1901.

B. A. Stockard and R. C. Jones, composing the firm of Stockard & Jones, et al., Plaintiffs in Error,
vs.
Clint Morgan and J. N. McCutcheon.

In error to the Supreme Court of the State of Tennessee.

[April 7, 1902.]

This is a writ of error to the Supreme Court of the State of Tennessee, brought to review a judgment of that court reversing a judgment of the Court of Chancery of Hamilton County in favor of complainants, and dismissing their bill.

The complainants sought to enjoin the collection of a tax imposed upon them under a statute of Tennesseee, upon the ground that they were not liable for the tax because they were agents and brokers exclusively for the sale of the property of non-resident principals, and did no business of any kind for residents of the State. They also averred that the State statute, properly construed, did not include their business, but if it did, it was void as contravening the Federal Constitution in its interstate commerce clause.

The defendants by answer averred that they sought to collect the tax under the authority of the statute of the State of Tennessee, providing for the collection of a privilege tax on the occupation of the complainants as merchandise brokers, and that such statute was valid.

Other parties similarly situated commenced suits against the defendants to obtain like relief. By an agreement, which was approved by the court, all the cases were consolidated under the style of *Stockard & Jones* v. *Morgan and others*, under which title it was agreed that they should thereafter proceed as one case.

The case came to trial in the Chancery Court upon the following agreed statement of facts:

"In this consolidated cause the following agreement is made as to the facts relating to the matters in controversy, viz:

"It is agreed that the several complainants in the original bills, to wit, J. H. McReynolds, Stockard & Jones, W. G. Oehmig, T. M. Carothers and J. H. Allison are residents of Hamilton County, Tennessee.

"That said J. H. McReynolds has been carrying on business in Chattanooga, said county and State, during the present year, 1900; that said Stockard & Jones, W. G. Oehmig, T. M. Carothers and J. H. Allison have been carrying on business in said city during the years 1897, 1898, 1899 and 1900.

"That the character of said business so carried on by the respective complainants, or the manner of conducting the business of each, is and has been as follows:

"The complainant, as the representative of non-resident parties, firms or corporations, solicits orders for goods from jobbers or wholesale dealers in Chattanooga, Tennessee, and when such orders are obtained sends them to his non-resident principal or principals. If an order is accepted the goods are shipped by such non-resident principal or principals to the local jobber or wholesale dealer. Up to the time of the sale the goods in all instances belong to the non-resident principal or principals, and are shipped to the State of Tennessee from another State.

"In making sales or soliciting orders for the goods the complainant sometimes exhibits samples to the local jobber or wholesale dealer and sometimes takes the orders without showing a sample.

"Unless complainant has been previously authorized by the principal or principals to sell at a fixed price, the orders are taken subject to acceptance or rejection by such non-resident principal or principals, who own the goods.

"At the end of each month, or at stated periods, the complainant is paid a commission by such non-resident principal or principals for goods previously sold on accepted orders. No commission is paid on orders taken but rejected. Complainant does not receive for his services any pay or salary from any local jobber or dealer or resident of Tennessee, nor does he assume to represent, or represent or hold himself out as representing, any resident of Tennessee or negotiate any sales of goods for residents of Tennessee. His principals are all residents of other States of the United States, and the goods sold are shipped from such other State to the State of Tennessee for delivery to buyers who reside in Tennessee.

"The complainant has an office or 'headquarters' in Chattanooga, Tenn., where he keeps samples, stationery and other articles; but he travels around on foot daily or frequently in drumming or soliciting orders for goods, as before stated. His principals are specific parties, firms or corporations, all non-residents of Tennessee and residents of other States in the United States, and he does not represent or hold himself out as representing the public in general, or negotiate or sell for any resident of Tennessee.

"The defendants and solicitors for the State of Tennessee and Hamilton County contend that, under the facts, the complainants are 'merchandise brokers,' and each of them is bound for privilege taxes under the laws of Tennessee.

"That J. H. McReynolds should pay a privilege tax for 1900 to the State of $20.00, and to the county of $20.00.

"That Stockard & Jones should pay to the State $20.00 for each of the years 1897, 1898, 1899 and 1900, and a like sum for each of said years to the county of Hamilton.

"That each of the other complainants owe the same sums as Stockard & Jones.

"That all of the complainants should be held for proper penalties, costs and attorneys' fees if they are held liable for such taxes.

"The complainants contend that they are engaged exclusively in interstate commerce and are not bound for such privilege taxes; further, that the revenue laws of Tennessee applicable to 'merchandise brokers' do not

include these complainants, so as make them subject to privilege taxes; but even if such laws do include complainants, yet they are inoperative and void as against complainants, who are engaged solely in interstate commerce."

By agreement of the parties two questions only were argued in the State court: (1) whether or not complainants were merchandise brokers and subject by statute to tax as such; (2) whether or not their business constituted interstate commerce, and therefore was beyond the reach of the State's taxing power.

The chancellor held that the complainants were not liable for the privilege tax and enjoined its collection perpetually, and adjudged the costs against Hamilton County. From the judgment so entered the defendants appealed to the Supreme Court of the State, which, as stated, reversed the judgment and dismissed the bill, holding the complainant's business was covered by the statute, and that it did not violate the Constitution of the United States.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

In this case we are bound to give the same meaning to the State statute that was given to it by the Supreme Court of the State, and the question which remains for us to decide is, whether as so construed the statute violates any provision of the Federal Constitution.

We think it violates the interstate commerce clause of the Constitution of the United States, and that this court has in several cases decided the principle which invalidates the statute so far as it affects the business of the complainants. The principle is contained in the cases of *Brown* v. *Maryland*, (12 Wheat. 419,) and *Welton* v. *Missouri*, (91 U. S. 275.) Subsequently the case of *Robbins* v. *Shelby Taxing District*, (120 U. S. 489,) was decided, which is one of the leading cases upon the subject now in hand, and we think that it is decisive of the case before us. That case was tried upon an agreed statement of facts as follows:

"Sabine Robbins is a citizen and resident of Cincinnati, Ohio, and on the —— day of ——, 1884, was engaged in the business of drumming in the taxing district of Shelby County, Tenn.; *i. e.*, soliciting trade by the use of samples for the house or firm for which he worked as a drummer, said firm being the firm of 'Rose, Robbins & Co.,' doing business in Cincinnati, and all the members of said firm being citizens and residents of Cincinnati, Ohio. While engaged in the act of drumming for said firm, and for the claimed offense of not having taken out the required license for doing said business, the defendant, Sabine Robbins, was arrested by one of the Memphis or taxing district police force, and carried before the Hon. D. P. Hadden, president of the taxing district, and fined for the offense of drumming without a license. It is admitted the firm of 'Rose, Robbins & Co.' are engaged in the selling of paper, writing materials and

such articles as are used in the book stores of the taxing district of Shelby County, and that it was a line of such articles for the sale of which the said defendant herein was drumming at the time of his arrest."

The court held upon these facts that the statute of Tennessee of 1881, enacting that "all drummers and all persons not having a regular licensed house of business in the taxing district 'of Shelby County,' offering for sale, or selling goods, wares or merchandise therein by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege," was void as against Robbins.

The opinion of the court was delivered by Mr. Justice Bradley, in the course of which he said (page 494):

"In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject. In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States, for selling or seeking to sell their goods in such State before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one State to sell his goods in another State, without in some way obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may, perhaps, safely take his goods to the city of New York and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another State without first procuring an order for them. It is true, a merchant or manufacturer in one State may erect or hire a warehouse or store in another State, in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or store in every State with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business it may adopt it with advantage. Many manufacturers do open houses or places of business in other States than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do who wishes to sell his goods in other States? Must he sit still in his factory or warehouse, and wait for the people of those States to come to him? This would be a silly and ruinous proceeding. The only way, and the one, perhaps, which most extensively prevails, is to ob-

tain orders from persons residing or doing business in those other States. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such States for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce is to speak at least unadvisedly and without due attention to the truth of things."

And again at page 496:

"But it will be said that a denial of this power of taxation will interfere with the rights of the State to tax business pursuits and callings carried on within its limits, and its rights to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent; but only in those cases in which the States themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution. And this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the State gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege cannot make it so. Can the State legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a State privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual States, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them."

Other cases followed the *Robbins* case, among them, *Philadelphia &c. Company* v. *Pennsylvania*, (122 U. S. 326;) *Leloup* v. *Port of Mobile*, (127 Id. 640;) *Asher* v. *Texas*, (128 Id. 129;) *Stoutenburgh* v. *Hennick*, (129 Id. 141;) *McCall* v. *California*, (136 Id. 104;) *Norfolk &c. Railroad Company* v. *Pennsylvania*, (136 Id. 114;) *Crutcher* v. *Kentucky*, (141 Id. 47.) These cases exhibit different phases of the same general principle, but all follow that principle as announced in the *Robbins* case, and deny the right of the State to tax people representing the owners of property outside of the State, for the privilege of soliciting orders within it as agents of such owners for property to be shipped to persons within the State. We think they cover the facts of the case at bar and render the statute as construed by the State court invalid so far as it affects the business of the complainants described in the agreed statement of facts above set forth.

The defendants in error, admitting the finality of the decisions above referred to in regard to the questions therein decided, claim that they do not in truth cover the case before us, and they urge that it is controlled by *Ficklen* v. *Shelby County Taxing District*, (145 U. S. 1.) A reference to that case shows important and material distinctions of fact which render

it unlike the one now before us. The opinion of the court was delivered by the present Chief Justice, who, while recognizing and approving the *Robbins* and other similar cases, distinguished them from the one then under review. In the course of his opinion he said, (page 20):

"In the case at bar the complainants were established and did business in the taxing district as general merchandise brokers, and were taxed as such under section nine of chapter ninety-six of the Tennessee laws of 1881, which embraced a different subject-matter from section sixteen of that chapter. For the year 1887 they paid the $50 tax charged, gave bond to report their gross commissions at the end of the year, and thereupon received, and throughout the entire year held, a general and unrestricted license to do business as such brokers. They were thereby authorized to do any and all kinds of commission business and became liable to pay the privilege tax in question, which was fixed in part, and in part graduated according to the amount of capital invested in the business, or if no capital were invested, by the amount of commissions received. Although their principals happened during 1887, as to the one party, to be wholly non-resident, and to the other, largely such, this fact might have been otherwise then and afterwards, as their business was not confined to transactions for non-residents. In the case of Robbins the tax was held, in effect, not to be a tax on Robbins, but on his principals; while here the tax was clearly levied upon complainants in respect of the general commission business they conducted, and their property engaged therein, or their profits realized therefrom."

And again (at page 24) it was said:

"We agree with the Supreme Court of the State that the complainants have taken out licenses under the law in question to do a general commission business, and having given bond to report their commissions during the year, and to pay the required percentage thereon, could not, when they applied for similar licenses for the ensuing year, resort to the courts because the municipal authorities refused to issue such licenses without the payment of the stipulated tax. What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record."

From these extracts from the opinion it is seen that a material fact in the case was that Ficklen had taken out a general and unrestricted license to do business as a broker, and he was thereby authorized to do any and all kinds of commission business, and therefore became liable to pay the privilege tax exacted. Although Ficklen's principals happened in the year 1887 to be wholly non-residents, the fact might have been otherwise, as was stated by the Chief Justice, because his business was not confined to transactions for non-residents.

In this case the complainants did not represent or assume to represent any residents of the State of Tennessee, and each of the complainants represented only certain specific parties, firms or corporations, all of whom

were non-residents of Tennessee. They did no business for a general public. We attach no importance to the fact that in the *Robbins* case the individual taxed resided outside of the State. He was taxed by reason of his business or occupation while within it, and the tax was held to be a tax upon interstate commerce. Nor does the fact that the complainants acted for more than one person residing outside of the State affect the question. If while so acting and soliciting orders within the State for the sale of property for one non-resident of the State, the person so soliciting was exempt from taxation on account of that business, because the tax would be upon interstate commerce, we do not see how he could become liable for such tax because he did business for more than one individual, firm or corporation, all being non-residents of the State of Tennessee. The fact that the State or the court may call the business of an individual, when employed by more than one person outside of the State, to sell their merchandise upon commission, a "brokerage business," gives no authority to the State to tax such a business as complainants'. The name does not alter the character of the transaction, nor prevent the tax thus laid from being a tax upon interstate commerce. As was said by Mr. Justice Bradley, in the *Robbins* case, *supra*, "The mere calling the business of a drummer a privilege cannot make it so. Can the State legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a State privilege to carry on interstate commerce?" It is still a carrying on of interstate commerce, whether the party is acting for one or more principals residing outside of the State and selling their goods through his procurement, acting for them as their agent.

We cannot see that the *Ficklen* case rules the one before us. Although it is plain from the opinion of the Chief Justice that there was not the slightest intention of casting any doubt upon the correctness of the decisions in the *Robbins* and other cases above cited, it is subsequently stated in *Brennan* v. *Titusville*, (153 U. S. 289,) that the case of *Ficklen* "is no departure from the rule of decision so firmly established by the prior cases." In speaking of the distinguishing features of the *Ficklen* case, Mr. Justice Brewer, in delivering the opinion of the court in *Brennan* v. *Titusville*, said, (at page 307:) "In other words, the tax imposed was for the privilege of doing a general commission business within the State, and whatever were the results pecuniarily to the licensees, or the manner in which they carried on business, the fact remained unchanged that the State had, for a stipulated price, granted them this privilege. It was thought by a majority of the court that to release them from the obligations of their bonds on account of the accidental results of the year's business was refining too much, and that the plaintiffs who had sought the

privilege of engaging in a general business should be bound by the contracts which they had made with the State therefor."

Although it is said in the opinion of the State court herein that the thing taxed is the occupation of merchandise brokerage, and not the business of those employing the brokers, yet we have seen from the cases already cited that when the tax is applied to an individual within the State selling the goods of his principal who is a non-resident of the State, it is in effect a tax upon interstate commerce, and that fact is not in anywise altered by calling the tax one upon the occupation of the individual residing within the State while acting as the agent of a non-resident principal. The tax remains one upon interstate commerce, under whatever name it may be designated.

That such a tax amounts to an invasion of the commerce clause of the Constitution of the United States is held in *Stratford* v. *City Council of Montgomery*, (110 Ala. 619,) in a most satisfactory opinion by Chief Justice Brickell. In speaking of the tax under the Alabama statute, he said, (p. 628): "While, as we have shown, the business of the defendant was general, so as to constitute him a broker, it by no means follows that it required he should also take local business. He might, as he did, confine himself to the interstate business and still be a 'broker,' without becoming liable to the tax." The statute of Alabama is similar to the one in Tennessee, and the facts in the above case are almost identical with those agreed upon herein.

Although the State has general power to tax individuals and property within its jurisdiction, yet it has no power to tax interstate commerce, even in the person of a resident of the State.

We regard this case as within the *Robbins* and other similar cases above referred to, and it follows that the judgment of the Supreme Court of Tennessee, holding the complainants liable to pay the tax demanded, was erroneous. The judgment of that court is, therefore, reversed, and the case remanded for further proceedings not inconsistent with the opinion of this court.

It is so ordered.

Mr. Justice GRAY took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.